



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY

1116 14 1c

THE OHIO NISI PRIUS REPORTS.

NEW SERIES. VOLUME III.

BEING REPORTS OF CASES DECIDED

BY THE

SUPERIOR, COMMON PLEAS, INSOLVENCY AND
PROBATE COURTS OF THE
STATE OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1906.

COPYRIGHT, 1906,
BY THE OHIO LAW REPORTER COMPANY.

Rec. June 25, 1906

TABLE OF CASES.

Ammer, In Re (Brannock Law Election Contest)	329	Chambers v. Wilcox	269
Anchor Fire Ins. Co., Burrell v.	321	C. & H. Coal & Iron Co., Cleveland Trust Co. v.	424
Andrix v. Columbus	368	C. H. & D. Ry., Troy Wagon Works v.	412
Archdeacon v. Cincinnati Gas Co.	606	Cincinnati v. Frey	627
Archdeacon v. Cincinnati Gas Co.	45	Cincinnati, McLean v.	676
Avon Beach & Southern Railway, In Re	561	Cincinnati, Puccini v.	362
Bailey v. T. & O. C. Ry. Co..	366	Cincinnati, Short v.	117
Baker, State v.	622	Cincinnati v. Street Railway Co.	485
Barricklow v. Bowland, treasurer	78	Cincinnati Gas Co., Archdeacon v.	45
Barron, Cincinnati Traction Co. v.	633	Cincinnati Gas Co., Archdeacon v.	606
Barry, Sheriff, Jiha v.	65	Cincinnati Traction Co. v. Barron	633
Bellefontaine v. Haviland ...	99	Cincinnati Traction Co., Bershiet v.	575
Bergin & Brady v. Fraas, clerk	206	Cincinnati Traction Co., Nellis v.	527
Bergin v. Braun	150	Cincinnati Traction Co., Durack v.	531
Bershiet v. Cincinnati Traction Co.	575	Cincinnati Traction Co. v. Holzenkamp	537
Besuden, Reakirt v.	646	Citizens Telephone Co., Burns v.	257
Binkley, admrx., v. Binkley et al.	33	Cleveland Electric Illuminating Co. v. Hitchens	57
Black, Liebschultz v.	393	Cleveland Trust Co. v. Coal & Iron Co.	424
Bleher, Knights Aid Association v.	673	C., N. O. & T. P. Ry. Co., L. & N. Ry. Co. v.	109
Blinn v. Rickett	345	Cole, Columbus v.	353
Bloom v. Newark	480	Columbus, Andrix v.	368
Board of Education v. Bowland, treasurer	122	Columbus, Borger v.	261
Borger v. Columbus	261	Columbus Board of Education v. Bowland, treasurer	122
Boswell, In Re	555	Columbus v. Columbus Gas Co.	293
Bowland, treasurer, Bowland v.	78	Columbus v. Cole	353
Bowland, treasurer, Board of Education v.	122	Columbus, Fulton v.	358
Braun, Bergin v.	150	Columbus v. Glackin	356
Breuer v. Frank	581	Columbus, Hermann et al v.	216
Bullock v. Bullock, executor..	190	Columbus, Osborne v.	1
Burns v. Citizens (Columbus) Telephone Co.	257	Columbus, Railway v.	438
Burrell v. Anchor Fire Ins. Co.	321	Coney Island Co. v. Mitsch, admr.	81
Carlisle, State v.	544	Conine, Hickey, admr., v.	269

Crilly, Vadakin v.	609	In Re John Ammer (Brannock Law Election Contest).....	329
C. & S. W. Traction Co., Fancher v.	559	In Re J. H. Schoepf.....	93
Culbertson, Rohrer v.	197	In Re South Charleston Beal Law Election Contest	373
Dow v. Dow et al.	125	In Re Wightman (Brannock Law Election Contest in Newburgh)	129
Durack v. Cincinnati Traction Co.	531	Jackson v. Washington (City) ..	453
Ellsperman, State v.	593	Jiha v. Barry, sheriff.....	65
Elyria Milling Co. v. Swartz..	251	Johnson, Smith v.	8
Engelcke, guardian, v. Engelcke et al.	88	Knights Aid Association v. Bleher	673
Estate of Anthony Ferguson, ..	549	Kraft, Linghler v.	653
Fagin, Railway v.	30	Kraft v. Wolf	105
Fairman, In Re	485	Krickenberg v. Wilson, Mayor	179
Fancher v. C. & S. W. Traction Co.	559	Laylin, State, ex rel, v.	185
Ferguson, Estate of.....	549	Lee, Clara, In Re.....	533
Fiedler, Police Judge, State v.	283	Liebschutz v. Black et al, trustees	393
Findlay Board of Education, State v.	401	Liggett v. Liggett	518
Forsythe, State v.	429	Lima, Hutchinson v.	55
Fountain Square Theater v. Pendery	41	Linghler v. Kraft	653
Fraas, clerk, Bergin & Brady Co. v.	206	L. & N. Ry. v. C., N. O. & T. P. Ry.	109
Frank, Breuer v.	581	Lowe, Avery C., In Re.....	641
Frey, Cincinnati v.	627	MacBride v. Gould	469
Frappzler, State v.	303	McLean v. Cincinnati	676
Fulton v. Columbus	358	Mahoney v. Scottish Union Ins. Co.	246
Gas Company, Archdeacon v. ..	45	Maile, Nicholson, v.	201
Gas Company, Columbus v. ..	293	Miller v. Innis	50
Gillfillan, State, ex rel, v.	153	Mirick, Ginn v.	448
Ginn v. Mirick	448	Mitsch, admr., Coney Island Co. v.	81
Glackin, Columbus v.	356	Moorman v. Voss	145
Goodhue v. Goodhue	225	Mooter v. Whitman	141
Gould, MacBride v.	469	Nellis v. Cincinnati Traction Co.	527
Haviland, Bellefontaine v.	99	Newark, Bloom v.	480
Haynes v. Hillsboro	17	Nicholson v. Maile	201
Hermann v. Columbus	216	Osborne v. Columbus	1
Herold v. Herold	405	P., C. & St. L. Ry. v. Fagin ..	30
Hickey, admr., v. Conine.....	209	Pendery, Fountain Square Theater v.	41
Hillsboro, Haynes v.	17	Plageman, Stroppel v.	501
Hitchens, Electric Co. v.	57	Polly, George D., In Re.....	265
Holzenkamp, Traction Co. v.	537	Puccini v. Cincinnati	362
Hutchinson v. Lima.....	55	Railway Co., Cincinnati v.	485
Innis, Miller v.	50	Railway v. Columbus	438
In Re Avery C. Lowe.....	641		
In Re Avon Beach & Southern Railway	561		
In Re Clara Lee	533		
In Re George Fairman.....	485		
In Re George D. Polly.....	265		
In Re George M. Boswell.....	555		

TABLE OF CASES.

v

Railway v. Fagin	30	State v. Shay	657
Railway, State v.	234	State v. Taylor, Prosecuting	
Railway, Troy Wagon Works		Attorney	505
v.	412	State v. T. & O. C. Ry. Co....	234
Reakirt v. Besuden.....	646	State, Walter v.	13
Reinhard v. Reinhard	280	Stroppel v. Plageman	501
Rickett, Blinn v.	345	Sullivan v. Telephone Co.	257
Robeson, Judge, State v.....	5		
Rohrer, admr., v. Culbertson.	197	Taylor, State v.	505
Rosen v. State	276	Telephone Co., Burns v.....	257
Schlagel v. State	429	Telephone Co., Sullivan v....	257
Schoepf, In Re	93	T. & O. C. Ry. Co., Bulley v..	366
Scottish Union Ins. Co., Ma-		T. & O. C. Ry. Co., State v....	234
honey v.	246	Traction Co., Durack v.....	531
Shay, State v.	657	Traction Co., Nellis v.....	527
Short v. Cincinnati	117	Troy Wagon Works v. C., H.	
Smith v. Johnson	8	& D. Ry.	412
South Charleston, In Re Elec-			
tion	373	Urbana, M. & C. Ry. v. Colum-	
State, ex rel, v. Carlisle.....	544	bus	438
State v. Baker	622		
State v. Board of Education		Vadakin v. Crilly	609
(Findlay)	401	Volk v. Westerville	241
State v. Ellsperman	593	Voss, Moorman v.	145
Swartz, Elyria Milling Co. v.	251		
State v. Fiedler, Police Judge	283	Walter v. State	13
State, Forsythe v.	429	Washington, Jackson v.	453
State v. Fronzier et al.....	303	Westerville, Volk v.	241
State v. Gilfillan et al.....	153	Whitman, Mooter et al v.	141
State v. Laylin	185	Wilcox, Chambers v.	269
State v. Robeson, Judge.....	5	Wilson, Mayor, Krickenberg	
State, Rosen v.	276	v.	179
State, Schlagel v.	429	Wolf, Kraft v.	105

OHIO NISI PRIUS REPORTS.

NEW SERIES—VOLUME III.

CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,
COMMON PLEAS, PROBATE AND INSOLVENCY
COURTS OF OHIO.

FAILURE TO APPROPRIATE FUNDS FOR MUNICIPAL EMPLOYEES.

[Common Pleas Court of Franklin County.]

OSBORNE V. CITY OF COLUMBUS.

Decided, October 21, 1904.

*Municipalities—Conflict Between Agencies of—Employees of—Can Not
Rest Right of Recovery for Services upon Contract—Failure to
Appropriate Sufficient Funds to Pay—Wrongful Suspension of Em-
ployees—Public Policy.*

1. An employe of a municipal corporation can not rest his right to recover for services rendered upon contract; and, if wrongfully suspended, he can not, without taking proper steps to have himself reinstated, compel the municipality to pay him compensation for the period during which he was suspended.
2. Where the appeal for reinstatement is made to a civil service commission, the authority of which the director of public safety refuses to recognize, the appeal should be followed by an application to a tribunal having jurisdiction to decree and enforce a reinstatement.

3. But where the suspension is made on the ground that the municipality has failed to provide funds to pay for the services of a suspended employe, the suspension is not wrongful, and neither a contract of employment nor the civil service act would furnish him any protection against a suspension on that ground.

BIGGER, J.

The case is submitted to the court upon the demurrer of the plaintiff to the answer of the city. The plaintiff seeks to recover his salary as a member of the fire department of this city during the period when, by order of the director of public safety of the city of Columbus, he was suspended from the force, upon the ground, as stated in the order of suspension, that the funds appropriated by the city council for the payment of the fire department for that year (1902) were insufficient to pay the entire force, and that it was, therefore, necessary to suspend a number of the fire force, of which plaintiff was one. This suspension was first ordered in October of 1902, by which order he was suspended to the first of January, 1903, and again on the last day of December, for the same reason, he was again suspended for lack of funds. Shortly after each order of suspension the plaintiff appealed to the civil service commission, which found the suspension to be without authority, and attempted to order his reinstatement.

The answer sets up the fact that after the suspension of plaintiff and twenty-eight other members of the fire department, during the latter part of the year 1902, to-wit, from October 20, the expenses were kept within the appropriation, leaving only a balance of \$41.43, and that the salary of plaintiff and the other twenty-eight members so suspended, would, for the period from October 20, to the end of the year, have amounted to something over \$4,000. It is set out that the director of public safety, C. C. Philbrick, foreseeing that it would be impossible to pay the entire force of firemen, had appealed to the city council to take some action to relieve the embarrassing situation, but that no action was taken and no additional funds were provided. It is then averred that, at the beginning of the year 1903, it was again apparent to all the city officials that the income of the fire department would be

1905.]

Osborne v. City of Columbus.

insufficient to meet the expenses, if the number of men provided by the city ordinance should be retained, and that the plaintiff and twenty-eight other men were again suspended without pay until the 4th day of May, 1903, by which a saving of over \$7,000 to the city was effected. That, as a matter of fact, the total receipts of the fire department somewhat exceeded the estimate of the same made at the opening of the year 1903, but notwithstanding this saving of over \$7,000, by reason of the suspension, the total receipts of the department for the year exceeded the total disbursements by only \$900.47, and that the disbursements were kept within the receipts only by reason of the suspension of this plaintiff and the other members of the department.

It is stated that, during all the time of this suspension from the 20th of October to the 4th day of May, the plaintiff performed no services of any kind or nature whatsoever for the city, but it is admitted he was ready and willing to do so, but was not permitted to do so. There are other averments in the answer which I will not now undertake to state, as they are not material

Very elaborate briefs have been filed upon both sides. I will not undertake to cite or comment upon the numerous cases cited by counsel, but only to state generally my conclusion.

There seems to be some conflict in the authorities, and as a result of my examination of them, I am led to the conclusion that the plaintiff, if the facts stated in the answer be true, can not recover, and upon these general considerations or principles which seem to me to be deducible from the authorities. That an employe of a municipal corporation can not rest his right to recover upon contract, is, I think, clearly established; that, if wrongfully suspended, he can not, without taking the proper steps to have himself reinstated, compel the municipality to pay him compensation during the suspension. The authorities which hold that it is unreasonable that one who is wrongfully suspended may sit quietly by, and without any effort to recover his place, hold the city liable for his compensation, seem to me to be reasonable and founded upon correct principles.

But in this case the plaintiff did appeal to the civil service commission. The authority of this commission, it is stated, the director of public safety would not recognize, claiming that it was an unconstitutional body, because created by special act of the Legislature. Except for the provisions of this civil service law, the director of public safety had the power under the Charter Law to suspend employes in his department. It must be conceded that this act which called into existence the civil service commission was clearly unconstitutional, but whether constitutional or unconstitutional it had no power to enforce obedience to its findings as against the director of public safety.

Here then was a conflict between two of the agencies of the city, as to whether or not the plaintiff was rightfully suspended. Clearly, it seems to me, if the plaintiff had, by virtue of his employment by the city, any right to continue in its employment, he could in a proper action before a tribunal having jurisdiction have had such right decreed, and decree enforced. Could he, under such state of facts, stand by indefinitely, and without appeal to some tribunal having authority to compel his reinstatement, hold the city liable for his compensation when no services were in fact rendered? Or, was it not his duty to have appealed to such tribunal, so that if the city should be compelled to pay for the services, it might also receive *quid pro quo*? There seems to me, I confess, to be much force in the reasoning that to adopt such a conclusion would be against public policy, as it would encourage those wrongfully removed to refrain from an appeal to a tribunal having power to enforce obedience to its mandates and obtain compensation without the rendition of the equivalent in services. If the plaintiff can not rest his right to compensation upon a contract obligation as against the city, then he can apparently only recover his compensation from the fund appropriated by the city council for that purpose, and if the city council did not make a sufficient appropriation, and in fact did not at any time, as is averred, during the year make an appropriation from which he could be paid, upon what principle can he now recover?

But there is, it seems to me upon consideration of the authorities a further and perhaps more serious legal obstacle to the

1905.]

State, ex rel, v. Robeson, Probate Judge.

sustaining of this demurrer, and that is found in the line of decisions cited by counsel for the city, that where the city has failed to provide funds to pay for the services, that an employe suspended upon that ground is not wrongfully, but rightfully suspended, and that neither his contract of employment nor the civil service act would furnish him any protection against a suspension upon that ground. The answer sets out that, as a matter of fact, the city had not, at the time of the suspensions, nor did it afterwards either during the year 1902 or 1903, provide a fund from which the plaintiff and the other suspended members of the fire department could have been paid. That, in other words, while the city council had fixed the number of firemen, that it did not in fact provide the funds from which the director could pay them, and that this necessitated a reduction of the force. It seems to me that if these averments of the answer be established, that upon the authorities cited the plaintiff can not recover. In the Kentucky case cited, it seems that the board which attempted to suspend did not have any such authority under the law, and the court so found. But the director in this case clearly had the power to suspend, and it would seem, upon the authority cited, that if he did suspend upon that ground, that it was rightful, and that the civil service board could not reinstate one suspended for such cause.

The demurrer for these reasons must be overruled.

J. E. Sater, for plaintiff.

J. M. Butler, for defendant.

APPOINTMENT OF JAIL MATRONS.

[Common Pleas Court of Darke County.]

THE STATE OF OHIO, EX REL SMITH, v. DONOVAN ROBESON,
PROBATE JUDGE.

Decided, February 13, 1905.

Jail Matrons—Discretions of Probate Judge as to Appointment of—Not Limited to Personal Fitness—Mandamus.

The act of April 8th, 1904 (97 O. L., 86), authorizing the sheriff of any county to appoint not more than three jail matrons, no appointment to be made except on the approval of the probate judge,

State, ex rel, v. Robeson, Probate Judge. [Vol. II, N. S.]

confers on such probate judge a discretion which can not, at least in the absence of gross abuse, be controlled or directed by writ of mandamus.

ALLREAD, J.

This action is brought to compel the defendant as probate judge to approve the appointment and fix the salary of a jail matron to have care of female, insane and minor prisoners.

It is alleged that the appointment of a person for such purpose has been made by the relator, as sheriff, and that the defendant, as probate judge, has, without cause, refused approval of said appointment and refused to fix a salary.

The answer of the defendant admits that the appointee is not objectionable to him, and bases his refusal to approve the appointment upon other grounds.

The cause is submitted upon a demurrer to the answer.

The right to make and have approved the appointment of a jail matron rests upon the force and effect of the act of April 8th, 1904 (97 O. L., 86). By the terms of this act the sheriff of any county may appoint not more than three jail matrons, whose duties are defined. It is provided that—

“No such appointment shall be made except on the approval of the probate judge, and the probate judge shall fix the compensation of said matrons, which shall not exceed \$60 per month.”

It is contended by the relator that the power of making the appointment under this act rests solely in the sheriff, and that the discretion of the probate judge is limited to an approval or disapproval of the personal fitness or acceptable character of the appointee.

A fair and reasonable construction of the act sustains a broader view of the discretion of the probate judge. Not merely the personal fitness of the appointee, but the appointment itself is subject to his approval. This interpretation is in harmony with the spirit and reason of the law as reflected from its history and the causes leading to its enactment. Special laws had been passed for the more populous counties under which jail matrons have been appointed. By recent decisions of the Supreme Court such special acts were invalidated. The Legis-

1905.]

State, ex rel, v. Robeson, Probate Judge.

lature deemed it necessary to meet these conditions by general laws. To prevent abuse of the general power so granted, and as a check against its unnecessary use, the approval of the appointment by the probate judge was required. Both the sheriff and probate judge must concur in the necessity and propriety of the appointment before it has any validity.

This view is amply supported by law writers and adjudicated cases.

Meeham in his work on Public Officers (Section 124), says: Where the appointing power "can be exercised only by and with the consent and approval of the senate or other similar body, its exercise has no effect unless such consent or approval be given."

Chief Justice Marshall, in the famous case of *Marbury v. Madison*, 1 Cranch, 137, declares that the delivery of the commission to an appointee is merely clerical and subject to judicial control. But that the nomination by the president and the appointment with the advice and consent of the Senate are discretionary and political acts which are not subject to judicial control, and that an application to the court to control in any respect such discretion would be rejected without hesitation.

In *Walkins v. Walkins*, 2 Md., 341, a writ of mandamus to compel the Senate to act upon a nomination of the governor was denied. 23 Am. & Eng. Encyclopedia of Law, 347, and authorities cited.

It is therefore clear to my mind that the court has no authority, at least in the absence of gross abuse, to control or direct the defendant in the exercise of this discretion so confided in him by law. See *Selby, Auditor, v. State, ex rel*, 63 O. S., 541.

In this view of its interpretation no opinion need be offered as to the constitutionality of the act; nor as to whether the appointment, if made, would constitute an office within the meaning of the Constitution.

The demurrer to the answer is held to relate back to the petition and sustained.

Anderson, Bowman & Anderson, for relator.

Robeson & Yount, for defendant.

EVIDENCE IN SUPPORT OF CLAIM FOR INJURIES.

[Superior Court of Cincinnati, Special Term.]

ELSIE SMITH v. WM. R. JOHNSON.

Decided, March 4, 1904.

Physical and Moral Health of Plaintiff—Collateral Proof as to—Scope of Cross-Examination—Presumption of Contributory Negligence—Charge of Court.

1. In an action for damages on account of an injury received, testimony as to the irregular life of the plaintiff, offered for the purpose of showing a probable impairment of health prior to the accident, is inadmissible.
2. The rule which permits an attack upon the credibility of a witness in a civil case is confined to proving a reputation of want of veracity and does not permit proof directed against the general moral character of the witness.
3. A special charge that "if plaintiff by her own testimony in support of her cause of action raises a presumption of contributory negligence, the burden rests upon her to remove that presumption," was properly refused where there was nothing whatever in any of the testimony in the case implying negligence on her part.
4. Ordinary care requires no such prescience as would have been necessary on the part of the plaintiff in the present case to have avoided injury; and in such a case a court would be warranted in instructing the jury that, as a matter of law, there was no contributory negligence.
5. A charge to the jury as to facts excusing contributory negligence, although unnecessary, in the opinion of the court, is not to the prejudice of the defendant if no contributory negligence existed.

HOSEA, J.

The facts in brief were that defendant's wagon stood backed against the pavement curb, at right angles thereto. The loading, as appears, was completed. Certain planks projected from the wagon bed in the rear wholly or partially across the pavement. Some barrels stood at the house line back of the wagon, which more or less impeded the passageway—if any existed—at the rear of the projecting boards. Plaintiff, coming along the pavement towards her home near by, seeing or supposing

1905.]

Smith v. Johnson.

that there was no passageway at the rear, started to go into the street to pass around the obstruction as others had done. At about that time the driver mounted his wagon and started the horses quickly in such manner that the projecting lumber was swept with force, laterally around, across the pavement, struck the plaintiff, knocked her down and injured her severely. Plaintiff and her physician testified to her good health prior to the accident and to specific injuries to health resulting from the injuries received.

Objections based upon what are claimed to have been erroneous actions in the case by the trial court are here considered in the order presented.

1. That the plaintiff and her physician having testified that she was in good health before the accident, the attending physician who treated her for the injuries received was asked on cross-examination whether "regularity or irregularity of life affected a patient's health," and he answered affirmatively. Thereafter defendant proposed to prove by police officers that plaintiff led an irregular life, which testimony was excluded by the court.

Defendant admits that such testimony if offered to impeach the character of plaintiff would be properly excluded, but claims the offer was "for the purpose of showing that the injury complained of, especially her extreme nervousness, was not due wholly, if at all, to the accident, but was the result of her mode of life."

It was competent for defendant to contradict plaintiff's testimony as to her good health before the accident; but this means physical and not moral health. Under the elementary rule requiring the best kind of evidence suited to the fact to be shown, the proof must be direct and not indirect; that is: the evidence must relate to physical and not moral symptoms. What was proposed to be shown was a purely collateral fact, belonging to a wholly different class of facts, which was assumed to possess such a relation of cause and effect with the fact to be shown, as that the primary fact might be conclusively presumed from the collateral fact. But the major

premise of this syllogism assumes that a relationship which might possibly be true of a class, or in an average, is true of every individual in the class. History and observation disprove this assumption. The method of reasoning upon which defendant sought to introduce the testimony, has also been discredited by the Supreme Court (see *Village of Shelby v. Claggett*, 46 O. S., 549, page 555).

It may be worth while to note also that the "irregularity" of life which the physician (Dr. Erwin) understood counsel to ask about, and concerning which he answered, had reference simply to regularity of bodily habit—as to sleeping, eating, etc.—and not, as counsel erroneously assume, to dissolute, dissipated or immoral lapses, as appears in the next succeeding question and answer to those quoted here in the brief. The omission to include these in the brief was doubtless an oversight, but it is nevertheless important, for it takes away the entire basis of fact for the argument. It is often assumed that people with red hair have ungovernable tempers, but the assumed relation would hardly justify proof that a man had red hair, for the purpose of contradicting evidence of his peaceable and quiet disposition.

2. On cross-examination the plaintiff was asked the question, "How many times have you been arrested?" which was excluded upon objection, and the dictum in *Coble v. State*, 31 O. S., 102, is cited as authority to the contrary. That case, however, was a criminal prosecution under a section of the criminal code, providing that convictions may be shown to affect credibility, and is not in point in civil cases of this nature. The established rule as to attacking credibility in civil cases is by proving reputation for want of veracity; and such proof must be restricted thereto and not involve the general moral character (*Perkins v. Mobley*, 4 O. S., 668). Moreover, it is quite within the discretion of the trial court to allow or disallow cross-examination as to a witness' past record, and it should be excluded if unjust to the witness or not called for by the case itself. *Wroe v. State*, 20 O. S., 460 (471); *Hanoff v. State*, 37 O. S., 178 (180); *Bank v. Slemmons*, 34 O. S., 142 (147).

1905.]

Smith v. Johnson.

Nor can questions be asked in cross-examination as to collateral matters for the purpose of contradiction (*Kent v. State*, 42 O. S., 426). And in a case of the nature of the one at bar, refusal to admit evidence of moral lapses has been sustained by our court of last resort (*Shelby v. Claggett*, 46 O. S., 549). The action of the court here is sustainable also upon still another ground, viz., that it is not permissible under guise of cross-examination at any time, to get in evidence not provable in defense (*Duval v. Davey*, 32 O. S., 604, page 613).

3. Refusal of the first special charge, to-wit, that "if plaintiff by her own testimony in support of her cause of action raises a presumption of contributory negligence, the burden rests upon her to remove that presumption," is also assigned as error. A review of the testimony in the case satisfied me beyond question that the first impression was correct, and that this charge was properly refused. There is nothing whatever in plaintiff's testimony or any other testimony in the case that implies negligence on her part. The theory urged by defendant throughout the case, and especially in argument, however, caused the court to lose sight of the first and better impression on this point, and to leave the question to be determined by the jury. It may be admitted that logically this was a technical error; but if so, it was in the defendant's favor and not to his prejudice.

The theory of defendant is based on the assumption that plaintiff, on approaching the wagon and seeing the boards projecting over the sidewalk, was bound to anticipate the possibility, first, of the driver getting on his wagon; second, of his starting his team with suddenness; and, third, of starting, not directly forward, or to the left, but to the right, and at such an angle with the pavement that the wagon would swing upon its hind wheel as a pivot and carry the projecting boards across the pavement like the projecting scythe of an ancient war chariot, and that, anticipating these possibilities, she was bound to govern herself accordingly and keep out of the way.

It is safe to say that ordinary care requires no such prescience. Although the question was submitted to the jury as a fact—of

which the defendant can not complain—yet it is clear from the record that as a matter of law, the court should have taken the responsibility of deciding the point and so advising the jury. The jury have decided it properly.

4. The charge as to facts excusing contributory negligence, although unnecessary, is not to the prejudice of defendant, if no contributory negligence existed. That it was the duty of the driver to look before starting his team must be conceded. The pavement is for pedestrians exclusively. He had no right to so load his wagon as to make it a dangerous agent to those passing rightfully upon the pavement, and then, without taking any precautions against injuring others, start in such a manner as to swing the lumber around in a way that could not possibly be anticipated by anyone on the pavement. The omission to look or to give warning, coupled with the manner and suddenness of starting—that is, giving the boards an added danger in the impetus of their swing—indicated such an indifference to the rights or safety of those who might be upon the pavement, as made his negligence gross (*Unger v. Rwy. Co.*, 51 N. Y., 497; 96 N. Y., 14; 62 N. Y. 558; 110 N. Y., 504; 108 N. Y., 349; 81 Hun., 604; 127 Ills., 9; 114 Mass., 83; 134 Mass., 118; 116 Ind., 477; 185 Penn. St., 265; 145 N. Y., 196.)

But in the view that I have taken of this case, the question is not a material one, as there was no contributory negligence to be excused. It seems to me—considering the whole case—that whatever errors were committed in the charge were not prejudicial to the defendant but were rather in his favor, and the motion for a new trial will be overruled.

John C. Rogers, for plaintiff.

Rufus B. Smith and *Tugman & Baker*, for defendant.

1905.]

Walter v. State of Ohio.

**HAVING IMPLEMENTS FOR SHOOTING IN THE OPEN AIR
ON SUNDAY.**

[Common Pleas Court of Cuyahoga County.]

MARTIN WALTER V. THE STATE OF OHIO.*

Decided, January 6, 1905.

Constitutional Law—Protection of Game—Having Shotgun and Cartridge in the Open Air on Sunday—The Constitutional Right to Bear Arms.

The provision found in 97 O. L., 436, which prohibits hunting or shooting, or having in the open air for such purposes any implements for hunting or shooting on any Sunday, is within the power of the state to provide for the protection, preservation and propagation of game, and is not in violation of the constitutional guaranty that "the right to keep and bear arms shall not be abridged."

BEACOM, J.

Martin Walter was arrested and tried before a justice of the peace and was found guilty under an affidavit which accused him of "having in the open air, for the purpose of shooting, implements for shooting, to-wit, one shotgun and cartridges, on the 16th day of October, 1904, the same being on the first day of the week, commonly called Sunday." He complains that this conviction was erroneous, and asks a reversal. The substance of his complaint is that the law under which his conviction was obtained was in violation of the Constitution of Ohio.

97 O. L., 436, and following contains an enactment of the Legislature, in substance entitled, "A law to provide for the protection, preservation and propagation of game." Section 16 prohibits the killing of certain game on Sunday, and Section 17 provides that no persons shall hunt or shoot or have in the open air for such purposes any implements for hunting or shooting on any Sunday.

*Affirmed by Circuit Court, February 27, 1905.

The affidavit embodies substantially the language of the statute, and, if the statute be valid, the affidavit is sufficient.

Does the statute which provides that no person shall have, on any Sunday, in the open air, for the purposes of hunting or shooting, any implements for hunting or shooting, violate the Constitution?

The Legislature does have power by proper legislation to provide for the protection and preservation and propagation of game. Game is the property of the whole public, and the Legislature may provide for its preservation.

This brings us to a consideration of whether the Legislature has power to make the provisions contained in Sections 16 and 17.

The best statement known to this court of the power of a legislative body in such matters is contained in the celebrated case of *McCulloch v. Maryland*, 4 Wheaton, 421, the opinion having been given by Marshall, and sometimes said to be the most admirable in the English language. It is there said, in determining whether or not the United States government had power to establish a bank:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The question then is, whether or not this provision, that nobody shall hunt on Sunday, that nobody shall be found in the open air on Sunday with hunting implements, comes within that language.

The court has said that the Legislature has a right to preserve the game by proper means, and is further of opinion that the provision that there shall be no hunting on Sunday and that no person shall be found on that day in the open air with hunting implements is, in the language of Marshall, "an appropriate means and plainly adapted to that end," to-wit, to the preservation of game.

But no means can be used which infringe the right to keep and bear arms as guaranteed by the Constitution.

1905.]

Walter v. State of Ohio.

That brings us to the constitutional phrase, "The right of the people to keep and bear arms shall not be abridged." There has been discussion as to what arms were meant in the Constitution, and a general consensus of opinion seems to be that the purpose of this provision was to enable the people to keep and bear arms of a military character. It is doubtful whether shotguns would come within the provision, because perhaps the only arms contemplated are the ones which fit the citizen for the defense of his country in time of war. But, however that may be, the right to keep and bear arms is to be enjoyed subject to such reasonable regulations and limitations as may be imposed by the law of the land. The right to keep and bear arms does not prevent the Legislature from passing laws regulating the manner in which arms shall be used. The Legislature shall not abridge the right below what it was at the time the Constitution was adopted. But let us see what its condition was at that time: "The offense of going armed with unusual or dangerous weapons, to the terror of the people, has always been indictable at common law" (A. & E. E. L., Vol. V, 729).

Moreover, the state Legislatures of the states have provided many limitations. For example, it has been provided that no one shall carry concealed weapons; that no one shall carry weapons either concealed or unconcealed into a court of justice, or into a church, or into a voting place, or within a mile thereof, and all these have been held to be valid restrictions upon the manner in which arms may be used. The right to keep and bear arms does not mean that a man may be a walking arsenal; that no limitations can be imposed upon the manner of their use. That is perfectly manifest.

In the volume last cited (5 A. & E. E. L.), it is said on page 742, that, although it is ordinary, in such restrictive legislation, to make exception in favor of a person on his own land, yet, if no exception be made, the law applies to one on his own land the same as elsewhere. I mention this because it is said in argument that petitioner in error was upon his own land.

In conclusion, the court is of opinion that the Legislature may pass laws providing for the preservation of game; that such laws must not be in violation of the constitutional provision that "the right to keep and bear arms shall not be abridged"; that the legislative enactment under consideration is plainly adapted to the preservation of game; that it does not violate any constitutional guaranty; and that it is therefore valid.

One further thing to be considered, and only one, is the case of *Martin v. The State*, 70 O. S., 219, and the only reason the court considers it is that counsel for petitioner in error seems to rely on it. In that case one Martin, standing in front of his own house, shot off a gun at night—shot into the darkness simply, without any aim or purpose, without any defined purpose, and the ball struck and killed a boy. He was charged with murder and found guilty of manslaughter. Manslaughter means the unlawful killing of a human being, not in a murderous way. The question was whether or not the firing of that gun was unlawful, whether or not the shooting came within Section 6962, Revised Statutes. All the court said (page 227) was that the statute should be read as though it stood this way: "Whoever discharges a gun on the property of another," etc., and that, inasmuch as the act of the accused did not come within the provisions of that section, his act was not unlawful and therefore he was improperly convicted. That case decided only that he, having fired while standing on his own ground, did not come within the provisions of Section 6962. It did not decide that the Legislature could not regulate the use of arms upon one's own premises. It only held that the Legislature had not attempted to do so.

Therefore the court finds that the law is valid; that it is adapted to attain the end which is sought to be attained; that the end is a legitimate and constitutional end; and that on the facts the defendant was not wrongfully convicted.

Petition in error dismissed.

W. C. Rogers, for plaintiff in error.

L. Q. Rawson, for the State of Ohio.

1905.]

Haynes et al v. Hillsboro et al.

JURISDICTION TO ORDER A BEAL LAW ELECTION.

[Probate Court of Highland County.]

**CHARLES E. HAYNES ET AL V. THE INCORPORATED VILLAGE OF
HILLSBORO, OHIO, ET AL.**

Decided, January 25, 1905.

*Liquor Laws—Jurisdiction of Council—Withdrawal of Names from
Petition—Before an Election is Ordered.*

It is the privilege of electors signing a petition for a Beal Law election to withdraw their names from the petition, either with or without the consent of council, at any time before the election is ordered; and where such withdrawals reduce the number of signatures remaining on the petition to less than the requisite forty per cent. of the qualified voters, jurisdiction of council to order an election is lost.

HUGHES, J.

Petition to contest special election under Beal Local Option Law.

This is a proceeding to contest a special election held in the village of Hillsboro, Ohio, on January 3d, 1905, under what is commonly known as the Beal Municipal Local Option Law, and is on petition of Chas. E. Haynes et al, plaintiffs, v. The Village of Hillsboro, Ohio, et al, defendants, filed January 7th, 1905, to which petition a demurrer was filed by defendants, on the grounds—

1st. That the law providing for such a contest is unconstitutional and void.

2d. That the probate court has not jurisdiction of the subject-matter.

3d. That said petition does not state facts sufficient to constitute a cause of action.

Counsel indicate in the argument that the first and second causes of demurrer are formal so far as this court is concerned and only for the protection of their rights in a higher court.

As to said first cause of demurrer, the constitutionality generally of this law having been upheld by the Supreme Court of Ohio, I am not inclined to make a different finding as to any

particular section thereof, and overrule said demurrer as to said first cause.

As to said second cause of demurrer: Article IV, Section 8 of the Constitution of Ohio, after investing the probate court with certain specific jurisdiction, adds, "And such other jurisdiction, in any county, or counties, as may be provided by law."

The Beal Law, Section 4364-20i, provides that the contest of elections held under such law shall be by petition filed in the probate court. Therefore it appears that the probate court has jurisdiction in this matter, and said demurrer is overruled as to said second cause.

We come now to the third cause of said demurrer, which resolves itself into the question as to whether or not the village council, at the time it adopted the resolution ordering the special election, had jurisdiction or authority to make such order? Had the persons who signed the petition, or any of them, the right, without consent of council, to withdraw their names after the petition was filed with council and before said election was ordered? Argument of counsel and authorities cited indicate that the right of petitioners to withdraw their assent is the sole "bone of contention" in this case.

The petition alleges, in part, that on December 5th, 1904, a petition containing the names of five hundred and eighty-six persons was filed with the village council; that the council referred said petition to a committee of three of its members for examination and report; that the number of votes cast at the last preceding municipal election was 1,249; that at a meeting of said council held December 15th, 1904, said committee reported to council that the names of more than forty per cent. of the qualified voters of said village as shown by the last preceding municipal election were found on said petition, and that it contained sufficient names of qualified electors to justify the holding of the election prayed for; that thereupon said council adopted a resolution for said election, and such election was held on January 3d, 1905, and that the vote cast at said election was "for said prohibition" 571 and "against said prohibition" 633, being a majority of sixty-two.

Petition further alleges that at the time of the examination of said petition by said committee there was presented to said com-

1906.]

Haynes et al v. Hillsboro et al.

mittee a paper, or papers, containing the names of 110 of those who had theretofore signed said petition, asking that their names be withdrawn from said petition and that they be not counted as petitioners for said election, but that said committee then refused to allow the names of such petitioners to be withdrawn, and included and counted them as petitioners in the number of qualified voters asking for such election; that said paper or papers containing said 110 names was presented to council and council informed that those whose names were on said paper or papers asked to withdraw their names from the petition for such election and to be counted against the same, but that said council refused to allow said names to be withdrawn or said persons to be counted against said election, and counted said 110 persons as petitioners for said election; that if the names of said 110 persons had not been counted for said election there would have been less than the required forty per cent. of qualified electors asking for said election, and that the proceedings of council is void and of no effect, and prays that said election may be set aside and held for naught.

The demurrer admits the facts stated in petition, therefore the question raised by said third cause of demurrer and for the decision of the court is purely one of law, *i. e.*, had the 110 persons a right to withdraw their names after petition filed, without consent of council and before said resolution was passed? This question has been ably and well argued *pro* and *con* and many authorities cited by counsel on either side in support of their views. A number of Ohio decisions have been cited, and I am of opinion that the Ohio decisions are ample in this matter, and shall confine myself to them, and apply the rule of law as I believe it to be in Ohio, under similar statutes, to the case at bar.

The decisions I shall consider now in connection with this case are: *Hays v. Jones*, 27 O. S., 218; *Grinnell v. Adams*, 34 O. S., 44; *Dutton v. Village of Hanover*, 42 O. S., 215; *In re Petition for Special Election in Toledo*, 2 N. P.—N. S., 469; *Cole v. City of Columbus*, 2 N. P.—N. S., 563; *Garrett v. County Commissioners*, Huggins, J., No. 4583 Highland County Common Pleas (not reported).

A number of foreign and other Ohio decisions have been cited and considered on minor points, but I do not consider them in

point in this case in view of the ones I have especially noted.

I shall attempt to analyze the cases above cited according to my judgment of their import and bearing upon this case, and give my conclusion of the whole matter.

Hays v. Jones, 27 O. S., 218:

This I consider the leading Ohio case on a kindred question of the right of a voter to withdraw his assent and thus defeat the jurisdiction conferred by the original petition. It is a proceeding under an act to amend the act of March 29th, 1867, authorizing county commissioners to construct roads on a petition of a majority of resident land owners along and adjacent to the line of road, passed March 31st, 1868. Under this act the first step toward giving jurisdiction to the county commissioners is the presentation of a petition "by five or more of the land holders whose lands will be assessed for the expense of the same," and the giving of bond by one or more responsible freeholders to secure the payment of the preliminary survey and report of the viewers, in case the improvement shall not be finally ordered.

The act of March 29th was further amended May 9th, 1868, and before the final order was made in this case. Section 5 provides:

"Upon the return of the report mentioned in the last section the commissioners shall, if in their opinion public utility requires it, enter upon their records an order that the improvement be made; but such order shall not be made until a majority of the resident land holders of the county, whose lands are reported as benefited and ought to be assessed, shall have subscribed the petition mentioned in the second section of this act."

A petition was signed by five or more resident land holders, bond given, preliminary view had and report made. The question is then made that petitioners can not withdraw their names after report of view is filed and before final order is made. In such case there may be two petitions, one conferring jurisdiction and power to order and cause to be made the preliminary survey, after which a majority petition may be subscribed conferring final jurisdiction; or the first petition may contain a majority of resident land holders, etc., and if nothing happens to change their original relation up to the time of making the

1905.]

Haynes et al v. Hillsboro et al.

final order, the commissioners are so authorized and empowered, but if at the time such final order is to be made, conditions of petitioners have changed, *i. e.*, have withdrawn their assent by remonstrance or otherwise, whether majority petition is signed and presented before or after the preliminary view and survey, the commissioners are in possession of the jurisdictional facts which confer upon them the power to make the final order. The court, in discussing this case, say:

“The statute can not mean that, if there is a majority of qualified persons at some time between the commencement of the proceedings and the time final order is to be made, whether there is such a majority at that time or not, the improvement may be ordered. As held in the first proposition, this jurisdictional majority must be found in the attitude of asking for the improvement at the time the proposed final order is to be made; and one who has subscribed the petition may, *at any time before the board makes the final order*, by remonstrance or other unmistakable sign, signify his change of purpose.”

Such petition may have been subscribed and filed even before the preliminary survey was ordered.

The court further say:

“His [the petitioner’s] assent is within his own control up to the time the commissioners move to make the final order.”

This settles clearly the question argued to the court in case at bar, that such withdrawals must be by and with the consent of council, and clearly indicates that consent of council is not necessary, but that petitioners may as a matter of right withdraw.

The court further say:

“The statute does not confer jurisdiction upon the commissioners; it designates them as the body upon which jurisdiction may be conferred; describes the *persons* and the *number* who may confer it, viz, ‘but such order shall not be made until a majority of the resident land owners of the county whose lands are reported as benefited and ought to be assessed have subscribed a petition.’ ”

So in the case at bar, the statute does not confer jurisdiction upon council, but designates the persons and number who may confer it, to-wit, Section 4364-20a, “That whenever forty per

cent. of the qualified electors of any municipal corporation shall petition the council," etc., the council shall act.

The court further say that the petitioner could not be silent until after the order had been made for the improvement, and then put in a remonstrance that would avail him anything.

Dutton v. Village of Hanover, 42 O. S., 215:

This was originally a petition in mandamus in common pleas against the village of Hanover, to compel that body to order an election as required by Sections 1633 to 1647, Revised Statutes, on the question of the surrender of its municipal powers. Section 1664 designates the character and number of persons who must sign the petition presented to the council. Section 1635 says:

"The council shall thereupon fix a day and place for holding the election," etc.

This case went to the Supreme Court on motion for leave to file a petition in error to the district court. The common pleas found in favor of relators in mandamus, and ordered the election held, and an appeal was taken to district court. On trial, the district court found that the number of electors required by statute had signed said petition before it was presented and referred to the committee, but that while the matter was in the hands of the committee a number of signers, sufficient to reduce the petitioners to less than the required number, had, with the consent of the committee, withdrawn their names, so that at the next regular meeting of the council there were a less number of petitioners than required by statute, motion was made to dismiss the appeal, the court overruled the motion, exceptions were taken and case went to Supreme Court.

The Supreme Court, in commenting on decision of district court, say:

"Did the district court err in holding that persons who signed the petition could withdraw their names therefrom before action had thereon? We think not. When the petition was presented it was the duty of council to take proper steps to ascertain if the signatures were *bona fide* and if it contained the required number who were electors. For that purpose the same might be referred to a committee and postpone action until the

1905.]

Haynes et al v. Hillsboro et al.

time for such examination. Between the time the petition was presented and the next regular meeting, at which action was had thereon, several signers withdrew their names. This they had the right to do, the council not having acted thereon." The district court in its finding states that the petitioners withdrew *with consent* of the committee. The Supreme Court does not mention consent of committee, but cites 27 O. S., 218, which is quoted herein, and emphatically says petitioners can as a matter of right withdraw before action is taken, and that the required number must be on petition at the time action is taken.

The court further say: If council had ordered the election, it may be they (the petitioners) could not then withdraw, but be that as it may, etc., intimating that even then there is a question. The court cite 34 O. S., 44, for authority that it is too late, in such cases, after final order is made. I will take up the case cited in 34 O. S. further along.

In re Petition for Special Election in Toledo, 2 N. P.—N. S., 469, being a petition for special election in Toledo under Brannock Law, O. L., 87. Section 1 of said law says:

"Whenever forty per cent. of the qualified electors of any residence district of any municipal corporation shall petition the mayor of such municipal corporation, or a common pleas judge of the county, for the privilege to determine by ballot, whether the sale of intoxicating liquor shall be prohibited within the limits of such residence district, such mayor or common pleas judge shall order a special election to be held in not less than twenty and not more than thirty days from the filing of such petition."

It will be noticed that the provisions of this law relative to special elections are very similar to the provisions of the Beal Law, except that petition is filed with the mayor or a common pleas judge. The time for holding the election is fixed in this law, as in the Beal Law. Counsel have attempted to show that 27 O. S. and 42 O. S., are not in point with case at bar, because no time limit is fixed in either of the state cases. In the Toledo case, the petition presented to the common pleas judge had 490 signatures, there being at least 920 votes cast in the district at the last general election.

The court says, after disposing of other questions in the case:

“The only remaining question is whether the petition now before me is signed by forty per cent. of the qualified electors of the district. Of the 490 signatures of the original petition, three names appear twice each; one petitioner has removed from the district since it was delivered, and I am satisfied that none but actual electors at the time election is ordered can be counted. There remains, therefore, but 485 electors to the original petition, and as the total vote at the last election was 920, and forty per cent. of this is 368, the election must be ordered unless the activity of interested parties in securing withdrawals is to be rewarded by having the withdrawals allowed, and the like zeal of others in securing more petitioners since the original petition filed, is held for naught.”

The court holds in the Toledo case that the 130 petitioners who have asked to withdraw therefrom have the right, and that five who withdrew have since asked that they be counted as petitioners, which is accordingly done. The court further hold that by fair analogy to other cases where the courts have held that petitioners have a right to withdraw before final order is made, that the same should apply to the Brannock Law, and that petitioners have the right to withdraw any time before final order is made.

In the Lucas county case, as well as a Montgomery county common pleas case under the Brannock Law, as to the limitation of time within which election is to be ordered, both courts hold such provision is directory only. In the case at bar I do not consider it material whether the like time of provision of the Beal Law be directory or mandatory, for the purpose of this hearing, as there is no question made here that the election was not held within the time stated in the law. I do not, however, claim that it is not mandatory. I desire to consider the case reported in 2 N. P.—N. S., 563, *Cole v. City of Columbus*, being a petition filed in Franklin County Probate Court to contest an election under the Brannock Law, in which case Judge Black, the judge of said court, apparently contradicts himself. His decision appears to be relied upon by both the contestors and the contestees in case at bar, and has been argued at length by counsel. It appears that the petition or petitions filed with

1905.]

Haynes et al v. Hillsboro et al.

Judge Rathmell in this Franklin county case were entirely controlled by a committee, which committee was trying to locate a residence district and were not sure of their territory. A petition, however, was filed purporting to have forty per cent. of the required electors of a certain district. Later this petition was withdrawn by a member of the citizen's committee before acted upon by the judge, and with his consent. Another member of the committee on the same day wrote a new description of a new and different district on said petition so withdrawn, and refiled the same petition with the new and different description. The election was then ordered, and held forty days after the original petition had been filed and thirty-one days after the re-filing. Judge Black held the time provision as mandatory, and that election could not be legally held more than thirty days after petition was filed, and set the same aside. In further discussing the case relative to the action of said committee, Judge Black says he does not doubt the authority of the committee to act in the first instance, i. e., they had full power from the electors to describe a district on the petition signed in blank and to file the petition with the judge, but that he is of the opinion that the instant the petition was filed the committee had exhausted its power and were not authorized to withdraw it; and that when a petition is once filed it must be either dismissed, because, for some reason it fails to make a *prima facie* case for an election, or the election must be ordered as provided by statute; that the filing of the petition sets in motion the machinery under the act, and from that moment the law and not individuals or committees control.

Following close on the heels of such statement, the court continues: "It is true that persons, before the mayor or judge have acted, may add their names to or withdraw their names from the petition," and cites 42 O. S., 215, which case is herein discussed. Continuing, the court says: "The adding of names to the petition after filing, if the petition already contained forty per cent. of the electors would not in law have any effect whatever; if a sufficient number withdraw their names to reduce the per cent. below the required forty per cent., the petition would, of course, have to be dismissed, and I take it that

the reason for not allowing persons to withdraw their names after action has been taken, is, that they are estopped—they have sinned away their day of grace; they did not speak when they ought to have spoken, and will not afterwards be heard to speak." The court further says this proposition is very different from a person or persons or committee acting without authority. These two statements appear to be contradictory and have been argued to this court in support of both views in case at bar. The distinction made, in my judgment, is that the person or persons or committee referred to are not clothed with power to change the facts; *i. e.*, make a new issue, while a petitioner has it within his own power to withdraw his name any time before final order. The right was within his own control, while certain rights only were delegated to said committee; consequently the decision of Judge Black, in my judgment, so far as it may be in point with case at bar, is, that petitioners have the right to withdraw their assent, but an unauthorized committee or individual can not withdraw petition and change the state of facts or the issue.

In connection with decision of Judge Black, I desire to consider the decision of Judge Huggins (Highland Common Pleas, Case No. 4583, *Garrett v. County Commissioners*). It was argued to the court at length, in case at bar, that it was the holding in case No. 4583 that petitioners could not withdraw their names after petition was filed with the commissioners, and as the signers were then found so they must remain. I do not so construe the decision of Judge Huggins. I take it to mean only that new facts and new issues can not be thrown into the case after petition is filed; *i. e.*, the petition must be determined upon the basis of the land owners at the time of filing petition, and excluding new land owners who might become so by purchase after petition is filed. I take it that he does not say that changes may not be made in the attitude of land owners, but that a change of land owners can not be made and thereby create new issues and a new state of facts.

Grinnell v. Adams, 34 O. S., 44:

This is a petition for alteration of a county road and is cited as bearing on this case, because the right of

1905.]

Haynes et al v. Hillsboro et al.

petitioners to withdraw was refused and upheld by the court. The proceedings before the county commissioners was under an act of January 27, 1853, entitled, "An act for opening and regulating roads and highways" and its amendments, and provides "that all applications for laying out, altering or vacating any county road * * * shall be by petition to the county commissioners, signed by at least twelve freeholders of the county residing in the vicinity," etc. Under this statute, only one petition is authorized, not as in the 27 O. S., one to cause preliminary view and later a majority petition. A petition with seventeen signatures was filed with the commissioners in this case, fifteen of whom were freeholders residing in the vicinity, etc., which was more than the necessary number to clothe the commissioners with power to act. The commissioners did act, viewers were appointed, made the view and reported favorably to the proposed alteration. Jurisdiction in this case attached when petition was filed and bond given. After view had been had and report made, nine of said petitioners signed a remonstrance against said proposed alteration. The court held in this case that after the bond was given, view had and report made, it was too late to remonstrate. A holding to the contrary would mean that in the case at bar petitioners could withdraw and defeat the order for election even after resolution passed by council. The court say that in so finding they do not undertake to overrule *Hays v. Jones*, 27 O. S., 218.

To me the distinction is very clear. In 34 O. S. case, jurisdiction had been assumed and action taken and practically only confirmation needed, while in 27 O. S., 218, no action had at all been taken and jurisdiction not assumed. Even if we were to give the contestees the benefit of all they claim on account of 34 O. S., the 42 O. S., 215, passes over it and cites 27 O. S., 218; and 42 O. S. case is so clear and clean cut in its terms that no room for doubt as to the rule established can be entertained.

The language of the Beal Local Option Law is not substantially different from the language of the statutes upon which decisions have been reported and discussed herein. There is nothing to show that it should receive a different construction from the ones already construed by the court. It is presumed

that the case in 27 O. S., 218, was known to the Legislature and to the judicial committee framing the law at the time of its passage, yet no different language was inserted in the statute, or any provision adopted which would show that the Legislature meant to provide a different rule of practice.

There is unquestionably a uniform rule established in such cases in Ohio under similar statutes, and a construction which brings this case within such rule, it seems to me, should be given.

The requirement of forty per cent. of electors in the attitude of petitioning council is purely jurisdictional; if an election can be ordered, held and sustained with less, it can be so ordered upon the petition of one elector, even without a single signature. If the 110 petitioners who attempted to withdraw could do so without consent of council before action had, and as a matter of right—and I hold they have that right—and did so make known their intentions, as it is admitted they did, then council was wholly without jurisdiction to order the election. It is an elementary principle of law that inferior tribunals of special and limited jurisdiction have no power except that which is directly given, or which is necessary to the exercise of the power specially conferred. Councils of incorporated villages come within the rule, and when the jurisdiction depends upon a given fact, that fact must exist. A finding by council that a fact exists, when in fact it does not exist, is not conclusive. It has been argued by counsel that if petitioners could withdraw their assent, and such withdrawals reduce the petitioners to less than forty per cent., council would necessarily have to postpone action so that those interested in the petition could secure more signers. It is the privilege of the promoters of a petition for an election under the Beal Law to make sure of the required forty per cent. of qualified voters, making due allowance for possible change of attitude, bearing in mind that when time has come for council to act in the matter, a continuance may not be granted by it, and probably not upheld by the courts if granted, and that council will either dismiss the petition or order an election.

It is argued that the petitioners have not the opportunity to know what action is being taken by the opponents to petition

1905.]

Haynes et al v. Hillsboro et al.

until too late for petitioners to retaliate. In case at bar, notice of the action of opponents is brought home to the petitioners, because it is the change of attitude of 110 of the original petitioners, as the probable result of the missionary work of the opponents to such petition, which gave birth to the contest petition in this case. The law makes such petition, after it is filed, a public document and open for inspection, so that its subscribers may be known to the general public, and this is the case whether it be a petition for election in a municipality where the sale of intoxicating liquor as a beverage is then prohibited, and it be a petition for an election upon the expiration of the two years' limitation, or whether it be a petition for election in a municipality where the sale of intoxicating liquor as a beverage is not then prohibited, either upon the expiration of the two years' limitation or where no election has ever been had. If in a municipality where it has not been prohibited those who do not want an election have the same right as had the opponents to the election in this case, the opponents to local option always having the first chance in such case, for before a village may have local option there must be a petition filed and an election held.

In this case I can only read the law in the light of the decisions of the higher courts herein quoted, and so reading and construing it, I am of the opinion that the 110 persons mentioned in the petition herein who attempted to withdraw their names from the petition for election had the right to do so, without consent of council; that they should not have been counted by council as electors petitioning for an election; that without counting said 110 electors there was not forty per cent. of the qualified electors of the village of Hillsboro so petitioning for an election, and that council was wholly without jurisdiction to order said special election. Demurrer to said third cause of action is therefore overruled and overruled as to each and every cause stated therein.

Worley & Wiggins and Steele & Sams, for plaintiffs.

I. McD. Smith, D. Q. Morrow and J. A. Wilkin, for defendants.

INJURY SUFFERED AT RAILWAY CROSSING.

[Superior Court of Cincinnati, General Term.]

**THE PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY
COMPANY V. ABNER FAGIN.**

Decided, February, 1905.

Negligence—Policeman Injured at Railway Crossing—While Acting in the line of Duty—Damages—Wages—Sick Benefits—Finding of Jury.

1. The fact that others differently situated saw a locomotive on a very dark night moving toward a railroad crossing without a head-light, does not warrant a reviewing court in holding that a policeman, who had stepped upon the crossing in the line of duty, and who did not see the locomotive, was guilty of contributory negligence as a matter of law.
2. Damages for an injury due to the fault of another can not be reduced by the amount of sick benefits paid to the one so injured; but where the one injured, who has sued for compensation merely and not for exemplary damages, elects to return the sick benefits in order to receive in place thereof full wages for the time he is disabled, he is not entitled to receive again the equivalent of such wages at the hands of a jury.

HOFFHEIMER, J.; HOSEA, J., and CALDWELL, J., concur.

Plaintiff in error was defendant below, and defendant in error was plaintiff below. The action was for damages for personal injuries caused by being struck by one of plaintiff in error's engines. Verdict was for defendant in error.

The record shows that defendant in error was a police officer; that on the night of the accident he stepped into the crossing upon which plaintiff in error's tracks were laid, to confer with the driver of a patrol wagon, who was responding to a call. While thus discharging his duty as an officer, he was struck by an engine which backed down on him. He testified there was no warning by bell, light or otherwise; that the night was dark; that he looked and heard nothing; that the gates were up and that the watchman who, when he does not put down the gates, warns pedestrians by lantern of approaching trains, failed to do so on this occasion; that just as he was about to turn after talking to the patrol officer, he was struck and in-

1905.]

P., C. & St. L. Railway Co. v. Magin.

jured. It also appeared that it was unusual for a train to come in the direction in which this engine did.

On the question of the engine backing without a headlight, or without ringing the bell, the testimony was conflicting, but there was sufficient testimony to warrant the jury in adopting the version it did, and, under such circumstances, the finding of the jury will not be disturbed.

It was submitted, however, that defendant in error was guilty of contributory negligence as matter of law; that, notwithstanding a failure on plaintiff in error's part to ring the bell or sound the whistle, the undisputed facts and circumstances show that, by the exercise of ordinary care, he might have avoided the injury; that the engine was going slow—about from four to six miles an hour—and that he could have seen it, had he looked.

Counsel relies on *Railway Company v. Lally*, 14 C. C., 333. The syllabus of that case is as follows:

“Where one suddenly steps on a railroad track without looking whether a train or engine is coming and is run down, he can not recover, when it appears that he, by first looking, would have seen an approaching engine, and that although the engine was coming with tender forward and no lights thereon where those in charge of the engine were not aware that the deceased would suddenly step on the track in this manner.”

The syllabus itself shows the case is not analogous to the one under consideration. Upon reading that case the difference is manifest. In the *Lally* case it appears the deceased did not look for the approaching train and suddenly stepped on the track, and furthermore that if he had looked he might have avoided the injury. In the case at bar, defendant in error looked for a train and “he heard nothing coming at all.” He did not see the approaching engine, nor could it be fairly said (as counsel for plaintiff in error insists) that he should have seen it; for, according to the testimony, he saw no light, heard no warning, and the night was “*very dark*” (Record p., 33). And it does not follow, because other persons differently situated saw the engine, that defendant in error would have seen it from the place where he stood directly in the line of its advance. We can not say that, under the circumstances, defendant in error was guilty of contributory negligence as matter of law.

It is also urged, on the authority of *Railway Co. v. Kistler*, 66 O. S., 335, that the court erred in its general charge to the jury with reference to defining the relative rights of the parties at the crossing, and that the charge was misleading.

The plaintiff in error reserved but a general exception, and upon reading the entire charge we are of opinion that the law was correctly stated and that those special parts of the charge, exception to which is now taken, are fully explained and modified. In addition to this, the special charges requested by plaintiff in error and given by the court fully cover the law on the points complained of, so that the error, if there was error, could not have been prejudicial. The special charges as requested by plaintiff in error and given by the court, and the general charge as a whole, were even more favorable for plaintiff in error than in the *Kistler* case.

It was also assigned as error that the court refused to give the following special charge:

"The plaintiff, if you find for him, can not recover for loss of time as prayed for in the petition."

It seems the defendant in error, by returning certain sick benefits he received from the relief association, became entitled to his full wages for the time he was disabled, and that he received such wages. Had he retained such benefits we think he would have been entitled to recover, notwithstanding the receipt by him of sick benefits, his lost wages. For damages can not be reduced by an amount which plaintiff may have received from third parties acting independently of the defendant, though it is given to the plaintiff on account of the injury. *Sedgwick on Measure of Damages*, Section 67 (8th Ed.).

But in this case, the plaintiff below made the loss of his wages an item of his damage, the action being for compensation merely and not for exemplary damages. If he received his wages for the time lost, and he testifies he did so receive them, he certainly was not entitled to again receive their equivalent at the hands of the jury. *Drinkwater v. Dinsmore*, 80 N. Y., 390.

There should, therefore, be a remittitur equal to the amount of the wages for the time defendant in error lost, and, upon this being done, the judgment will be affirmed with costs.

W. W. Ramsey, for plaintiff in error.

Charles W. Baker, for defendant in error.

1905.]

Binkley, Administratrix, v. Binkley et al.

**MARRIAGE CONTRACTS WHICH BAR A WIDOW FROM
DOWER.**

[Probate Court of Auglaize County.]

**DEBORAH BINKLEY, ADMINISTRATRIX OF DANIEL BINKLEY, DE-
CEASED, v. WM. F. BINKLEY ET AL.**

Decided, January 21, 1905.

*Marriage Contract—When a Bar to Dower—Facts which must be
Pleaded—Proof.*

In order to bar a widow of dower by reason of a marriage contract or anti-nuptial agreement, facts should be pleaded and proved showing that the terms and provisions of the contract were fair, reasonable and just to the wife under all the circumstances existing at the time the agreement was entered into.

STUEVE, J.

Heard on demurrers to answers and cross-petitions.

On July 7, 1904, Deborah Binkley was duly appointed and qualified administratrix of the estate of Daniel Binkley, deceased, and on the 24th day of August, 1904, filed her petition as such administratrix against William F. Binkley et al, heirs at law of the said Daniel Binkley, deceased, who died intestate, for the purpose of obtaining an order of the probate court for the sale of 104 acres of land, of which the said decedent died seized. The petition is in the usual form and of itself throws no light on the subject to be treated by this court.

On the same day Deborah Binkley, who is also the widow of said Daniel Binkley, deceased, came into court and filed her separate answer and cross-petition to the petition in said case, stating in substance: That she is the widow of said Daniel Binkley, deceased; and as such is entitled to dower in the whole of the premises described in said petition; that as such widow she composes a part of decedent's family; that she is still his widow and unmarried, and that at the time of his death she, with her deceased husband, resided on the first tract, comprising forty-one acres, described in the petition, and were using and occupying the same as their family homestead; that she

Binkley, Administratrix, v. Binkley et al. [Vol. III, N. S.]

is still residing thereon and using and occupying the same, and that she is entitled to a homestead as such widow in said first tract, under the laws of the state of Ohio.

She, in her said separate answer and cross-petition, prays the court that her dower may be duly assigned and set off to her in the whole of said premises, and also that a homestead may be duly assigned and set off to her by the appraisers in the first tract described in said petition, as provided by law, and for all other relief to which she may be entitled.

Summons were duly issued, served, returns made, and Sidney Sprague was during the interim appointed as guardian ad litem of Sadie B. Whetstone and five other minor defendants in said cause, and on the 24th day of September said Sidney Sprague, as such guardian ad litem, filed his separate answers and cross-petition in said cause, setting forth—

1st. That he, as such guardian ad litem, after the usual denials, says, as and for his second defense to the petition of said administratrix and the answer and cross-petition of Deborah Binkley, widow, that said Deborah Binkley, as such widow, is not entitled to dower in the whole of the premises described in plaintiff's petition and to a homestead in the first tract described in said petition, or in any of the premises of which the said Daniel Binkley died seized. He further avers that on the 11th day of February, 1879, in contemplation of a marriage entered into on said day by Daniel Binkley and Deborah Binkley, nee Deborah Bodkin, widow of said decedent, a contract was entered into by and between them, in consideration whereof the sum of two hundred dollars (\$200) was to be paid to the said Deborah Bodkin, now Binkley, at the death of the said Daniel Binkley, deceased. He further says that by the terms of said contract the said Deborah Bodkin, now Binkley, released all dower or expectancy of dower and all her rights to a homestead, and all of her interest, general or special, whether of dower or otherwise, in and to any real estate of which the said Daniel Binkley was seized at the time of making said contract, or that he afterwards acquired, or of which he was seized at the time of his death, and that said contract

1905.]

Binkley, Administratrix, v. Binkley et al.

was duly executed, filed for record and recorded in the book of contracts in the office of the recorder of Auglaize county. On said 24th day of September, 1904, Wm. Binkley and seven other defendants, all adults, heirs at law of said Daniel Binkley, filed their separate answers and cross-petitions to plaintiff's petition, and to the separate answer and cross-petition of said Deborah Binkley, widow, setting up substantially the same facts as set up in the separate answer of Sidney Sprague, guardian ad litem of said minor heirs. Each of said separate answers and cross-petitions of the defendants (not including the widow's) attached a copy under Exhibit "A" of the alleged contract entered into by and between Daniel Binkley and Deborah Bodkin on said 11th day of February, 1879.

To these separate answers and cross-petitions of the said defendants, said guardian ad litem and William F. Binkley and others, said Deborah Binkley, as administratrix, plaintiff, and as widow, filed demurrers to the second defense of said answers and cross-petitions, on the ground that said second defense in each of said pleadings is insufficient in law.

These demurrers were filed on November 12, 1904. The question now comes up on these demurrers. On November 29, 1904, counsel for the respective parties argued the said demurrers at a considerable length, and respectively cited numerous authorities.

I take it that the only question for me to determine is as to whether or not these separate answers and cross-petitions of Sidney Sprague, guardian ad litem, and William F. Binkley et al, defendants, are sufficient in law. I have gone to the trouble to examine the authorities presented to me and also some others that I thought might have some bearing in the case, but I find very little in addition to what has been cited for the purpose of determining the question before the court, outside of the authorities cited by counsel on either side.

In examining these authorities the trend of all of them is to the effect that each case presented to the court when the validity of a marriage contract or marriage settlement or jointure is drawn into question must be determined by itself. But

the general trend of all authorities that I have examined is to the effect that such agreements must be entered into in good faith, with the full knowledge of their consequences, and must be reasonable and fair in making a provision for the wife in the event of the husband's prior death, otherwise courts of equity will not permit them to be set up as defenses against the claim of the widow for dower or other statutory allowances.

In this particular case at bar, considerable stress is laid on the fact that because these separate answers of the heirs at law do not make any averment or averments that the contract between the widow and her deceased husband was fair; that no advantage had been taken of the bride; that the amount fixed in said contract to be paid to the widow at the death of her husband was a reasonable provision for such widow, and that simply a statement of the naked contract in the pleadings is not sufficient, and that therefore the demurrers should be sustained.

My idea of the case is that the demurrers should be sustained, and I feel that I am borne out in this by the decision of the Supreme Court in the case of *John Garver, Executor of John Miller, deceased, v. Sarah Miller*, and I cite counsel to that decision of the Supreme Court, found in Vol. 16, O. S. Reports, at page 532, upon which language of the court I feel satisfied I am not able to improve.

Judge Brinkerhoff, in determining that question, says (in language which I feel is decisive of this case):

"But, in respect to contracts of this, and of a kindred kind, equity is properly somewhat jealous of the influence which it is commonly in the power of the husband to exert in their procurement, however that influence may arise—whether from her lingering fondness and habitual deference, the restraint of his presence, his superior knowledge of business and values, or his powers of coercion and annoyance. Hence it is an essential element of the proposition above stated, that the terms of the contract in favor of the wife shall be fair, reasonable and just to her, in view of all the circumstances of the case and of the parties at the time the contract is made. If the contract be relied on in pleading, either as a cause of action or as a matter in defense, the pleading must contain averments which show

1905.]

Binkley, Administratrix, v. Binkley et al.

the contract to have been fair, reasonable and just to her under the then existing circumstances. If it become a question of fact, the proof must lead the mind of the chancellor satisfactorily to the same conclusion. It is not sufficient, either as a matter of pleading or of proof, to set up the naked contract and its execution by the husband. In addition to this, facts must be averred, or proved, or both, as the exigencies of the case may require, showing that the terms of the contract in favor of the wife were fair, reasonable and equitable, under the circumstances of the parties at the time it was made. And this doctrine runs through all the cases bearing on the subject.

"Tried by these principles, the second defense set up in the defendant's answer is defective as a complete bar to the plaintiff's action, as set forth in her petition; for it sets up the naked contract between the husband and wife, and its execution on the part of the husband, unaccompanied by averments showing the fairness, reasonableness and equitable character of its provisions in her favor, in view of all the circumstances of the case. In so far, then, as the said second defense was set up as a complete bar to the plaintiff's petition, we are of the opinion that there was no error in the court below in sustaining the demurrer thereto."

As stated before, all contracts of this kind must be fair, just and reasonable. I desire to call attention to the case of *William H. Grogan, by his guardian, v. Emma G. Garrison, by her next friend*, 27 O. S., at page 50. On page 58 of the opinion Judge Johnson, for the court, says:

"There is no statement of facts showing the extent and value of William Grogan's property at the date of the marriage, nor of the value of the property conveyed, nor of that remaining, to enable the court to say whether it was adequate or not.

"There is no averment that the deed was ever delivered to her, or that she, either during or after coverture, ever had possession; on the contrary, the court finds, as one of the reasons doubtless for sustaining the demurrer, that the premises are in the possession of the defendant; and still more, that, by proceedings in the probate court, instituted, as they must have been, by the defendants, or one of them, the property had been sold and converted into money.

"We mention this as accounting for the absence of such important averments in this defense."

This case, although not absolutely decisive of the proposition, refers to the fact that certain particular allegations must

Binkley, Administratrix, v. Binkley et al. [Vol. III, N. S.]

be made in a defense of such a claim in order to entitle the defendant to have any standing in court, and further on, on page 64 of that decision, the court says, "Each case must be determined on its own particular facts and equities." In that case the widow received a conveyance for less than one-tenth of the real estate. No value was stated; it was only for life, in less than one-third of the whole; nothing was ever done to put her in possession; no acceptance by her, or part performance, and no facts stated to show that it was fair, reasonable or just to her.

Judge Johnson proceeds further and says:

"It has been an axiom, accepted for ages, that dower was to be favored; that no widow should be barred of that ancient and cherished right, unless—

"1st. There has been settled upon her, in strict conformity to law, an estate, as jointure, possessing all those requisites already pointed out; or,

"2d. There was such adequate provisions made, in lieu of dower, as, under all the circumstances, was fair, reasonable, and just."

In the case of *Mintier v. Mintier*, in the 28 O. S., at page 312, Chief Justice Scott, in the very first paragraph of his opinion, presents a number of "ifs" or conditions which must exist in order to make the marriage settlement a bar to a claim for dower and other statutory allowances.

He says:

"If the ante-nuptial agreement in this case was intended by the parties to operate as an equitable jointure, and as such to bar all claims of the wife to dower in the real estate of the husband; if the parties were of mature age, and capable of judging in respect to their interests; if the agreement was fairly entered into in good faith, and without any fraud or imposition; if it was reasonable in its terms, and was in good faith acted upon and carried into effect by Robert Mintier during his life, no good reasons are perceived why the full effects should not be given to it, according to the intention of the parties."

Even as far back in the history of the state as 1846, Chief Justice Wood, in the case of *Stilley v. Folger*, refers to the fact

1905.]

Binkley, Administratrix, v. Binkley et al.

that the dower agreements must be fair and reasonable, and on page 647 of the 14th Ohio Reports in said case uses this language:

“In the opinion of this court, such agreements must be entered into *bona fide*, with a full knowledge of their consequences, and, under the circumstances, make reasonable provisions for the wife, or courts of equity ought not to permit them to be set up as equitable estoppels.”

And the circuit court in the case of *Johnson v. Johnson*, 1 C. C., 521, in a contract which is a good deal like the one in question in our case without any particular reasoning, as far as said report shows, says, that the answer is insufficient and that the court of common pleas did not err in sustaining the demurrer to it. In that case, there are no allegations in the answer that the agreement made between James B. Johnson and Anna Hammond, the widow, was just, fair and reasonable to the widow, and I conclude that the court holds that the answer so set up is demurrable because of the want of such allegations.

Now, in the case at bar, the separate answer of the guardian ad litem and William F. Binkley and other heirs simply recite the fact that Deborah Bodkin, now Binkley, entered into such contract, and they simply state or aver in their pleadings that she released all dower or expectancy of dower and all the rights to a homestead and of all her interests, general or special, whether of dower or otherwise, in and to any real estate of which the said Daniel Binkley was seized at the time of making said contract or that he afterward acquired or of which he was seized at his death.

There is not a single word of explanation that that contract was fair to the widow; that she knew what she was doing at the time; that she knew what the condition of her husband's property was; that she knew that he owned 104 acres; that she knew that he owned one acre of land, or that she knew that he was a man capable of acquiring property; that it was just and reasonable in making provisions for the widow in the event that she should survive him.

Binkley, Administratrix, v. Binkley et al. [Vol. III, N. S.]

Of course, there is no testimony offered (never is on a demurrer), but the demurrers search the pleadings. In this case the pleadings state that Mr. Binkley died seized of one hundred and four acres of land, and about ninety dollars worth of personal property, and that his debts at the time of filing said petition, as near as they could be ascertained, amounted to about \$609.

It strikes me from the statements or averments contained in the pleadings before this court that Mr. Binkley's estate would amount to perhaps, after the payment of debts and costs of administration, in the neighborhood of \$4,500 or \$5,000, and that such a sum as is stated in this marriage contract (\$200) to be paid to the widow in lieu of all claims, as the heirs now contend, is in the judgment of this court not fair, not just, and to say the least, is an unreasonable allowance from which to support herself.

A number of other cases are cited, but for this question are not necessary to be referred to.

Hence, in my judgment, as stated before, the demurrers to these answers and cross-petitions of the heirs of the decedent will be sustained.

An order or orders will be entered accordingly.

Layton & Son, for plaintiff.

Sprague & Lippincott, for defendants.

1905.]

Fountain Square Theatre Co. v. Pendery.

SPECIAL WARRANTY AGAINST ACTS OF GRANTOR.

[Common Pleas Court of Hamilton County.]

THE FOUNTAIN SQUARE THEATRE CO. v. ELIZABETH C. PENDERY.*

Decided, January, 1905.

Deed—Special Warranty Against Acts of Grantor—Can Not Be Enlarged—Unpaid Taxes not Within Such a Covenant.

1. A covenant of special warranty against the acts of the grantor contained in a deed, conveying only the "right, title and interest" of the grantor, can not enlarge it, but is limited to the estate granted.
2. Taxes which were unpaid by the grantor, and which were a lien upon the property at the time of the purchase, can not be recovered under such a covenant on the ground of a breach thereof.

PFLEGER, J.

Heard on demurrer to petition.

Can a purchaser under a special warranty deed conveying the grantor's right, title and interest to certain property, recover on the covenant of warranty against the acts of a grantor or those claiming under him for unpaid taxes, which were a lien upon such property at the time of purchase?

The petition sets forth in substance the facts in the above query. The property was a valuable one, and the consideration apparently was a fair market price. A demurrer was filed on the ground of insufficiency in law. On the theory that covenants are but contracts accompanying a deed of purchase, and that all such covenants are strictly construed against the grantor, one is led to the immediate conclusion that a liability accrues. On the other hand, it is a settled rule of law that the premises described, or the granting clause of a deed, may limit and control the covenant, but the covenant can never enlarge the premises. General covenants will be construed as limited to the premises and estate intended to be conveyed. They are intended to protect and can not be construed to enlarge the estate granted (Lamb, 14 Federal Cases, p. 1042—Case No.

* Affirmed by the Circuit Court, 6 C. C.—N. S., 78.

8024; *Reynolds v. Shearer*, 59 Ark., 299). So a deed conveying instead of the land only the right, title and interest of the grantor to the same, with a covenant of general warranty contained therein, such covenant is confined in its legal effect to the estate so conveyed, and the enforcement of a paramount title outstanding against the grantor at the time of the execution of the deed can not operate as a breach of the covenant (*Bumpus v. Anderson* [Tex.], 51 S. W., 1103; *Wrightman v. Spofford*, 56 Iowa, 145; *Brown v. Patrick*, 119 U. S., 175; *Sweet v. Brown*, 12 Met., 175, citing *Blanchard v. Burkes*, 12 Pick., 67, in which it was held that such a covenant operated by way of estoppel against the grantor in passing an after-acquired estate; 20 Pick., 458; *Young v. Clippinger*, 14 Kansas, 148, a decision by Justice Brewer; *Shumaker v. Johnson*, 35 Ind., 33). Nor would it be considered a breach of covenant by the eviction of the grantee under an incumbrance created by the grantor before making the conveyance (Bigelow on Estoppel, 5th Ed., p. 402; *Ballard v. Child*, 46 Maine, 152; *Sweet v. Brown*, *supra*; *Stockwell v. Cruillard*, 129 Mass., 231; Rawle on Covenants, Section 298). And this rule is applicable to special warranty deeds covenanting against the acts of the grantor or any of those claiming by, from, through or under him (15 Fed. Rep., 365).

An examination of the authorities indicates that Massachusetts first announced this doctrine; that many of the states followed these rulings, and, though great departures were made from it in other states, the Supreme Court of Massachusetts declined to vary the rule as to incumbrances created by the grantor in violation of his affirmative covenant to the contrary (*Hoxey v. Frinney*, 82 Mass., 332).

A few exceptions to the rule may be found. There is a strong dictum in *Lull v. Stone*, 37 Ill., 224-227, commenting on the early Massachusetts cases in 12 and 20 Pick. The justice in that case said:

"It is difficult to see if this be the true construction of such deeds, with what view covenants were inserted, unless to deceive the grantee with the idea that he was getting covenants upon which he could safely repose for the security of his title,

1905.]

Fountain Square Theatre Co. v. Pendery.

but which a narrow and technical construction would render utterly nugatory on the day of trial, keeping the word of promise to the ear, but breaking it to the hope."

I do not find the case cited or commented upon in any of the later reports of that state. In *Hubbard v. Apthorp*, 3 Cush., 419, the same cases in 12 and 20 Pick. were criticized, and the general covenants in a deed were not restricted merely to the interest of the grantor. In *Mills v. Catlin*, 22 Ver., 98, it was held that the covenants were not qualified by the grantor's interest, "upon the principle that the construction is to be upon the entire deed, and that one part is to help explain another, and that every word, if possible, is to have effect, and none to be rejected, and all the parts thereof agree and stand together, we think it must be held to have been the intention of the parties to grant the *land*, and that the habendum in the deed is to hold the land, and the covenants relate to the land, and insure the title to it. But if, after all, we consider the intention of the parties ambiguous, the rule would be interposed that the construction in such cases is to be most strongly against the grantor and in favor of the grantee, and this to prevent an evasion by the grantor by the use of obscure and equivocal words." This case does not appear to have been cited or subsequently commented upon in Vermont. See also *Van Renclear v. Karney*, 11 How. (U. S.), 297; *Milot v. Read* (Mont.), 29 Pacific Reporter, 343; *Williams v. Hall*, 62 Mo., 405.

Much could be said in favor of the deed, which bears upon its face as a consideration a large sum of money, tending to show its proximate value, and which could be defeated because the words of the grant are limited to the grantor's "right, title and interest to the property conveyed." Abstractly, as was said by the court in *Lull v. Stone*, *supra*, it seems but a narrow and technical construction, in violation of the general principle, that the whole deed should be read together, to exempt the party making the covenant from all liability for a palpable violation of it. The covenant is a contract, and if detached from the deed would, without doubt, have been enforceable. The doctrine was evidently intended to apply to

merely questionable or doubtful rights in lands sold by those who are supposed to have no substantial interest in the sale of the property. Had there been no decision in Ohio on this subject, I should have been tempted to follow the reasoning laid down in *Lull v. Stone* and *Mills v. Catlin*, *supra*.

In *White v. Brokaw*, 14 O. S., 339-343, however our Supreme Court said: "that where in a deed in the ordinary form of bargain, sale and release, and which purports only to convey to the grantees all the right, title and interest, claims and demands both in law and equity," of the grantors, "of, in and to the said premises and every part thereof," containing no recital or other description whatever of any particular interest in or possessed by the grantors or intended to be conveyed, a covenant is inserted by which the grantors agree to "warrant and forever defend the said premises against all persons claiming, or to claim, by, from or under them, their heirs or assigns such covenant is only co-extensive with the grant, and binds only vested interests of the grantors in the property at the time, and does not extend to an after-acquired title." This case was cited in *Hart v. Gregg*, 32 O. S., 512, and seems to be the law today. It is peculiarly applicable to and decisive of the case at bar, and can not be distinguished.

Defendant's counsel also insists that the taxes in this case were placed upon the property by the public authorities, and that they are not incumbrances originated by the grantor. Although it is unnecessary to pass upon this question, I can see no force in the argument. It matters not whether the incumbrance was created by an act of commission or omission. It is ascribed to the grantor. The grantor having parted with his "right, title and interest" to the land in accordance with the principle of *White v. Brown*, *supra*, the covenant of warranty affected only such title, and there was no technical breach of it. There is no cause of action stated in the petition and the demurrer thereto is sustained.

Frank H. Kunkel, for the demurrer.

D. D. Woodmansee, contra.

1906.] Archdeacon, Adm'r, v. Gas & Electric Co.

ABATEMENT OF ACTION THROUGH INCOMPLETE APPOINTMENT OF ADMINISTRATOR.

[Superior Court of Cincinnati, Special Term.]

CORNELIUS ARCHDEACON, ADMINISTRATOR, v. THE CINCINNATI GAS & ELECTRIC COMPANY ET AL.

Decided, March 22, 1905.

Administrator—Failure to Give Bond—Action for Wrongful Death Rendered Nugatory—Authority of Administrator Does not Relate Back—And the Bar of the Statute Runs Against the Beneficiaries—Jurisdiction—Remedy.

1. The limitation of two years is an essential condition of the right of action growing out of a wrongful death, and begins to run at once against the beneficiaries, and once beginning, it runs on to completion without interruption.
2. Where the appointment of an administrator of a decedent, who came to his death through the negligent act of another, is not completed until the cause has abated, an action brought before the cause abated, and before the appointment of the administrator was completed, can not be maintained.

HOSEA, J.

Heard on motion to dismiss.

The defendant, by leave of court, filed in this cause an amended answer, setting up that the plaintiff is without legal capacity to maintain this action, and upon motion to this effect the cause has been heard upon the amended answer as upon a plea in abatement, for the reason that it raises an objection, independently of the merits of the cause, which is fatal to the action if the facts be proved and the legal consequences claimed to result therefrom be sustained, and was duly heard upon evidence taken and arguments of counsel thereon.

The facts shown are that John Archdeacon came to his death on or before February 5, 1903, from causes claimed to be due to the negligence of the defendant companies; that on February 5, 1903, Cornelius Archdeacon applied to the probate court to be appointed administrator, making oath that there were no assets except the right of action in this behalf; and it also ap-

pears that on March 28, 1903, he filed a petition, as administrator, in the present suit, to which the defendant answered denying liability under the general issue.

It further appears that Cornelius Archdeacon did nothing further to perfect his application to be appointed administrator until March 10, 1905—after the cause had been set for trial—when he filed his bond in the probate court, and thereupon, on said March 10, 1905, letters testamentary were issued.

It is claimed in support of the plea that as the plaintiff here was not administrator in fact when the suit was brought, the proceedings therein were nugatory; and that when the plaintiff became administrator two years later, by perfecting his application and obtaining letters of administration on March 10, 1905, the cause of action had abated by the statutory limitation, and could not be revived, and that, consequently, the plaintiff is still without capacity to sue.

Against the plea it is claimed that, the statute in this behalf being remedial, all proceedings under it are to be construed liberally; that the power and the authority of an administrator upon appointment relate back to the time of death, or, at least, to the date of application, and thus cure the defect of premature action. Also, that, by answering, the defendant waived all objections, and is bound thereby, because the defect was a matter of public record which implies notice.

It must be admitted that under ordinary circumstances of equitable procedure the questions here would seem to be resolvable against the plea, provided the matter is one admitting of application of purely equitable considerations.

The statute in question (Revised Statutes, 6134, 6135) was originally passed March 25, 1851, and subsequently amended. The portions involved in the present consideration will be found in Section 6135, as follows:

“Every such action shall be for the exclusive benefit of [indicating beneficiaries], and shall be brought in the name of the personal representatives of the deceased person * * * and shall be commenced within two years after the death of such deceased person.”

1905.]

Archdeacon, Adm'r, v. Gas & Electric Co.

It is an established principle that conditions precedent required by law constitute part of the cause of action; and strictly, therefore, must be performed before the cause of action will accrue and the remedial right arise. This is invariably true of conditions precedent contained in a statute creating a right or duty unknown to the common law. *Pawlett v. Sandgate*, 19 Vert., 621; *Weeks v. O'Brien*, 141 N. Y., 199; *Bank v. Bank*, 19 Fed., 295.

The statute in question is of this character; it gives a right and a remedy which did not exist at common law, "and should have effect given to it according to the words used in it to accomplish the purpose intended." *Steel, Admr., v. Kurtz*, 28 O. S., 193.

"The action being a creature of the statute must be governed by the statute." *Wolf v. Ry. Co.*, 55 O. S., 527.

In *Wolf, Admr., v. Railway (supra)*, it is also held that while an estate will vest in the heir by operation of law, "it is otherwise as to the recovery of damages under our statute. While the liability is created by the statute, the damages do not become part of the estate, and are not cast as an estate by operation of law upon the beneficiaries, but must be sued for and recovered by action."

In *Helman v. Railway Co.*, 58 O. S., 409, it is held that the statute created no new liability upon the death of the party, but in effect removed the common law bar of abatement by death, and the right of action accruing to the party for the injury, and devolved it upon the administrator in succession; and that, in consequence, the administrator and beneficiaries stand in relations of privity with the deceased in respect of such right.

It follows, therefore, that the limitation of two years is an essential condition of the right of action, and begins to run against the beneficiaries, for whose exclusive benefit the right of action is given; and, once beginning, it runs on to completion without interruption. *Granger, Admr., v. Granger*, 6 O., 42.

The appointment or non-appointment of an administrator, therefore, being a matter within the control of the parties in interest, can have no effect upon the operation of the statutory limitation upon the cause of action.

The administrator is a mere trustee, in whose name the action must be brought. He has no right in the matter except in virtue of the right of the real parties in interest. If the right of the legal beneficiaries is lapsed or lost so that no remedy can be had upon it, it is manifest that the action can no longer be maintained. *Woodward v. Railway*, 23 Wis., 400 (cited and approved in 55 O. St., 531).

In a word, therefore, the beneficial interest in the subject-matter of the right of action passed in succession to the beneficiaries by virtue of the statute immediately upon the death; but the right to institute the action remained in suspense as an incident of the cause of action until the appointment of the administrator. But in the present cause the administrator did not come into existence as such until the 10th day of March, 1905, more than two years after the death of the injured party, at which time the right of the beneficiaries had lapsed, and, consequently, the cause of action was never legally completed. An administrator has no power to act before the grant of letters; his power is derived exclusively from his appointment. *Woerner on Administration*, etc., 409, 383.

It is fundamental that a plaintiff must have a right of action before bringing suit; and to constitute a right of action there must be a party entitled to institute process. *Ex parte Collins*, 49 Ala., 59; *Fruitt v. Anderson*, 12 Ill. App., 421; *Stratton v. R. R. Co.*, 74 Me., 422; *R. R. Co. v. R. R. Co.*, 38 Penn. St., 361; *Maia v. Hospital*, 97 Va., 507; *Patterson v. Patterson*, 59 N. Y., 574; *Angell on Limitations*, Chapter 7.

By the statute the right to institute action is vested in the administrator—by virtue of his capacity as such—and not in the individual. It is, therefore, a condition precedent to the right of action that an administrator be in existence, upon whom this right may devolve. This is very fully established in the case of *Weidner v. Rankin*, 26 O. S., 522, brought by the widow and children.

1905.]

Archdeacon, Adm'r, v. Gas & Electric Co.

In that case a defendant moved to vacate a verdict and judgment against him and for judgment *non obstante veredicto*, on the ground that plaintiffs were not authorized to sue. In the Supreme Court it was claimed by plaintiffs in error that the action was in the name of the real parties in interest; that the statute being remedial should be liberally construed; and that defendant had waived objections by failing to demur or answer specially. On the other side, it was urged that the remedy was purely statutory; that being in derogation of the common law the statute must be strictly construed; and that the defect was not merely want of capacity to sue, but want of a cause of action. The court held with the defendant, first, that the right of action vested in the personal representative and not in the beneficiaries; also that the petition must contain a cause of action in favor of plaintiff, and that the objection was not waived by defendant by failure to demur, although the facts stated might constitute a cause of action in favor of one not a party to the suit.

The application of these principles to the case at bar is manifest and conclusive. There was no cause of action in the plaintiff at the commencement of the suit. He had no right to bring suit, nor power to institute process. Had the defect been cured before the right in the beneficiaries lapsed, it is possible that by liberal construction a *nunc pro tunc* effect could have been given to his subsequent completion of his appointment; and this principle is the principle disclosed in many of the authorities cited by the plaintiff here in support of the argument; but in the case at bar there was no cause of action existing when the correction was made, because the beneficiaries were legally defunct. In other words, the cause of action had lapsed, and, consequently, could not be revived (*Lyons, Admr., v. Railroad*, 7 O. S., 339, 340). Consequently, the attempt to correct was of no legal effect.

The point is further made evident in *Railway Co. v. Hine*, 25 O. S., 629, wherein it is held that—

“The limitation of two years is a condition qualifying the right of action, and not a mere limitation upon the remedy.”

Also in *Wolf, Admr., v. R. R. Co.*, 55 O. S., 527, in which *Railway v. Hine* (*supra*), is approved and the matter re-stated briefly thus:

"It is not a defense in a proper sense, but a necessary condition to the right of action."

That is to say, it is not a mere matter of defense that can be waived by a defendant, but is jurisdictional, because it inheres as a condition precedent in the right of action.

Upon the facts, therefore, and upon the law as clearly set forth by our Supreme Court, I am constrained to hold the plea good and must, therefore, sustain the same.

Judgment for defendant, dismissing the petition.

D. T. Hackett and *W. A. Rinckhoff*, for plaintiff.

Outcalt & Foraker, for defendant.

FAILURE TO DELIVER POSSESSION OF PREMISES.

[Common Pleas Court of Franklin County.]

J. F. MILLER v. W. H. INNIS.*

Decided, January 24, 1905.

Landlord and Tenant—Failure to Deliver Possession of Premises—Avoids the Lease—Acceptance of Part of the Premises—Not a Waiver of Right to Abandon Lease.

1. There is an implied covenant on the part of a lessor to deliver the premises to the lessee at the moment he is entitled to take possession, and a breach of such covenant releases the lessee from the obligations of the lease.
2. Entrance by the lessee upon a part of the premises and his occupancy thereof for several months without objection does not amount to a waiver of the failure of the lessor to place him in possession of the remainder of the premises.

DILLON, J.

By written lease for one year, the defendant agreed to rent of the plaintiff a certain dwelling house for the sum of \$300,

* Affirmed by the Circuit Court, March, 1905.

1906.]

Miller v. Innis.

payable in monthly instalments. The lease further provided that the defendant should also have the use of a part of a large stable located by the plaintiff convenient to a number of cottages, said space to be for one horse and one carriage. The defendant occupied the residence for some seven months, when he left the same and has refused to pay for the remaining five months of the lease. The evidence shows that when the defendant attempted to put up his horse and carriage on the first day, he was refused admittance to the stable, and after subsequent attempts finally on the fourth day he ceased to make any further attempt and rented stable room elsewhere.

The evidence also shows that the defendant gave notice to the plaintiff on the first day that he had been denied admission to the stable by the person in charge thereof, acting under the plaintiff.

As this action is upon the lease, recovery, of course, must be had upon compliance therewith on the part of the plaintiff, or a willingness to comply therewith.

The first question that presents itself is new in this state, and has been the subject of considerable conflict in other jurisdictions. There is no question that where a tenant is dispossessed or denied possession by a stranger during his term, the landlord is not liable therefor, and the lessee himself must dispossess the stranger.

The question upon which there is so much conflict is this: In the absence of expressed agreement or covenant, is the landlord bound to deliver premises to the lessee in the first instance, free from the intrusion or possession of strangers? The conflict can be no better illustrated than by two excerpts from 18 Am. & Eng. Ency of L., at page 326, where it is held:

“Though there is an implied agreement on the part of the landlord that the premises shall be in such a condition that the lessee may enter thereon without hindrance at the time when his term is but begun, the fact that the possession is withheld from the tenant by a third person will not constitute a defense in bar of the landlord’s recovery of rent.”

But in the same book at page 615, we find this language:

“The lessor impliedly covenants to give possession to the lessee at the commencement of the term and if the premises are wrongfully held by a third person, it is the duty of the lessor to oust him.”

The leading case in favor of the plaintiff in this case is that of *Gardner v. Keletas*, 3 Hill, 330, in which the court held that if a lessee be prevented from entering upon the demised premises by a former tenant whose term has expired, or by any other stranger, the remedy of the lessee is to be sought against the intruder and not against the lessor, and that in such case the lessor was in no manner whatsoever liable. In other words, in such case the lessor is not bound in the first instance to deliver possession of the premises, but only the right of possession and free from any other paramount title granted by him.

Following this decision, the Supreme Courts of Missouri, Illinois, New Hampshire, and possibly one or two others, have so held.

The leading case *contra* is found in *King v. Reynolds*, 66 Ala., 229. And this decision has been followed in the states of California, Connecticut, and is further supported by the English authorities. In consideration of the principles and reasons adduced in these various cases, I incline to the English doctrine and adopt the reasoning of *King v. Reynolds*, 67 Ala., 229. That court held that there is an implication that at the time and the very moment fixed by the terms of the lease for the lessee to take possession, the landlord must deliver the same to him, and that to that extent the lessor impliedly covenants that there shall be no impediment to the lessee taking possession at the time stipulated, and that for a breach of such a covenant the lessee is not bound.

In the case of *Coe v. Clay*, 5 Bing., 440, which was decided after and upon a consideration of the contrary case of *Gardner v. Keletas* above, it was held that one who accepts a lease expects to and has a right to enjoy the property and does not merely obtain the chance of a law suit. A lease for a number of years is a chattel interest. The prime motive of the con-

1905.]

Miller v. Innis.

tract is that the lessee shall get a possession. Delivery is one of the elements of this contract. The thing itself must be delivered. Otherwise, we can easily conceive that a party accepting a lease and on the first day thereof attempting to get possession may find himself barred by the possession of another, perhaps a tenant holding over with color of right, and before he would be able to have the litigation determined, the time of his lease would have expired, or he would have been greatly injured thereby. The burden in such case would be placed upon the lessee, since he is out of possession, when in truth he should be so placed that the burden to prove should be upon every one else in the world before he could be dispossessed.

I am moreover of the opinion that in the case at bar there would be no conflict of authorities, for this reason, that by the terms of the lease the particular space in the large barn allotted to the lessee was not specified therein, and, therefore, remained to be indicated and set apart by the lessor. It thereupon became the duty of the lessor to set aside that space because the lessee would have no right to maintain any action to eject any particular person, not only for the reason that he did not and could not know what particular person was occupying his space, but he could not specify in his action for ejectment the premises to which he was entitled.

In such a case, therefore, it becomes the duty of the lessor to at once indicate and set apart the particular part of the stable for the lessee. Having failed to do so, it is clear to my mind that the lessee is not bound by the lease.

It is further argued by the plaintiff that the lessee, having entered a part of the premises and occupied the same for several months without objection, is estopped and has waived the failure of the lessor to place him in possession of the remainder of the property. To this I can not agree. This action it must be remembered is upon a written lease and not upon actual occupancy. The case will be simplified when the illustration is carried to larger limits. Suppose, for instance, a lease lets half a dozen different houses and farms which are separate and distinct. The occupancy by the lessee of all but one out of which he was dispossessed should not in law compel him to pay

rent for that particular one. Recovery must be had either upon *quantum meruit* or upon the lease. In this case there can be no recovery for the actual use of the stable. Likewise there can be no recovery upon the lease itself, since the lessee was kept out of possession through no fault of his own.

Judgment therefore will be for the defendant. Exceptions will be noted.

Rogers & Rogers, for plaintiff.

G. E. Bibbee, for defendant.

The case above reported was taken to the Circuit Court of Franklin County, where, after a hearing, the subjoined opinion was filed.

DUSTIN, J.; SULLIVAN, J., and WILSON, J., concur.

We have been much interested in the examination of the questions raised in this case, and take pleasure in commending counsel for their very full and able briefs.

Recognizing the conflict of authority on the main point, we are, however, of the opinion that the best reasoning is in favor of the contention that it is the landlord's duty to clear the way for the entrance to possession of the property by the lessee, on the first day of his term. See opinion of Stone, J., in *King v. Reynolds*, 67 Ala., 229, 233.

Furthermore, in the case at bar it was impossible for the lessee to get possession of the stable room, because same had not been designated and described to him.

Upon the whole we concur with the views of Judge Dillon in his written opinion.

The judgment of the common pleas court will therefore be affirmed.

1905.]

Hutchinson v. City of Lima.

**TENURE OF OFFICE OF SECRETARY OF WATER WORKS
TRUSTEES.**

[Common Pleas Court of Allen County.]

JOHN N. HUTCHISON v. THE CITY OF LIMA, OHIO.

Decided, February, 1905.

Office and Officer—Secretary of Water Works Trustees—Tenure of Office Of—Removal of By Abolishment of the Office of Trustees.

The duties of a secretary of water works trustees not being prescribed by statute, it follows that the position is not an office within the legal meaning of the word, and one appointed to that position for a fixed term, but discharged before the expiration thereof, can not enforce a claim for salary for the portion of the term he was not allowed to serve.

CUNNINGHAM, J.

Heard on demurrer to the petition.

Before the act under which the board of public service now manages and controls the water works of the city of Lima, a part of the new Municipal Code, the board of water works trustees elected the plaintiff its secretary, and fixed his term at two years. The statute then in force placed the management and control of the water works in that board, authorized it to elect its officers and agents and fix their terms, but the statute did not prescribe any of the duties of the secretary or other officers or agents of the board, so that they acted only under the orders of the board. Several months after the passage of the new act the Legislature abolished the office of water works trustees, and the board of public service placed their own employe in the place of Mr. Hutchison, and removed him. Mr. Hutchison waited until the end of his term, and brought suit against the city asking for a judgment for the amount of his salary for the part of his term of two years which had not expired when he was ousted. The defendant demurs to the plaintiff's petition, and many propositions of law are raised on that demurrer and many reasons are urged by the plaintiff why he ought to recover.

Without entering into a discussion of the many propositions coming up on this demurrer, this court feels that there is one proposition that disposes of the case. It is admitted by both sides, and certainly is the law, that a Legislature which has the power to create an office has the power to abolish it, and whenever it pleases. A person who is elected to an office has a proper right to the emoluments of that office and can not be removed before the expiration of his term except for cause; but the office can be abolished whenever the legislative power so wills. The position of secretary of the board of water works trustees is not *an office* in a legal meaning of the term, for no one is an officer in that sense whose duties are not prescribed by the statute. The water works trustees were officers because they were vested by the statute with the management and control of the water works. Mr. Hutchison was their employe. Now it being granted that the Legislature can abolish the office, how can its management and control and official power with regard to the water works continue? This plaintiff had no duty except to carry out the rules and orders of the board of trustees. Can he continue to carry out those rules and orders when the board itself is not in existence, and thus perpetuate a power that the Legislature has destroyed? Can there be such a thing as a servant without a master, or an agent without a principal? The court thinks not. His term expired when his principal ceased to exist.

So that the demurrer to the petition will be sustained and plaintiff, desiring to plead no further, the court renders judgment on the demurrer.

H. O. Bentley, City Solicitor, for the demurrer.

Becker & Becker, for the plaintiff.

1905.]

Cleveland Electric Co. v. Hitchens et al.

**ORDER TO PRODUCE BOOKS AND PAPERS FOR INVESTIGATION
BY COUNCIL.**

[Common Pleas Court of Cuyahoga County.]

**THE CLEVELAND ELECTRIC ILLUMINATING COMPANY V. EDMUND
HITCHENS ET AL.***

Decided, March 11, 1905.

Prosecution of Councilmen—Conduct Constituting Misconduct in Office—Statute Under Which Prosecution Should Proceed—Section 225 of the Municipal Code not Applicable—Compelling the Production of Books and Papers—Incriminating Evidence—Privilege of Witness—Bribery—Misfeasance.

1. A charge that two councilmen have accepted bribes, and that fifteen others are controlled in their voting by a certain party who contributed to the individual campaign funds of said councilmen while they were candidates for office, constitutes a charge of misconduct in office.
2. Inasmuch as the Legislature has made complete provision for the trial of such charges in a proper tribunal, and in view of the obvious objections to the trial of councilmen before their fellow members, and the failure of Section 225 of the Municipal Code to clearly include councilmen among the officers for the trial of whom provision is therein made, it must be held that Section 225 does not include councilmen among those against whom charges may be preferred.
3. The production of books and papers can not be compelled, where it is manifest to the court that if they would tend in any way to be useful in the prosecution of the case in hand, they must and to subject the party to whom they belong to penalties and punishment.

BEACOM, J.

Plaintiff, the Cleveland Electric Illuminating Company, is a corporation organized under the laws of Ohio, engaged, in the city of Cleveland and vicinity, in furnishing electric light and power. Defendant, the city of Cleveland, is a municipal corporation under the laws of Ohio. The other defendants are, respectively, the mayor, the city solicitor and the members of the city council of said city.

*Affirmed by Circuit Court March 18, 1905.

In February of this present year the mayor of Cleveland, acting under the provisions of Section 225 of the Municipal Code, filed with the council written charges against seventeen members of the council, alleging against them misconduct in office. Against fifteen of these councilmen it was alleged, in substance—

“That each of them being a member of the council and thereby an officer of the city, did allow his vote upon an ordinance to be controlled by the Cleveland Electric Illuminating Company, said control being exercised by contributions to the individual campaign funds of some of said persons as candidates for said offices.”

Against two other councilmen it was alleged “That said and, on the 6th day of February, 1905, being members of the city council of Cleveland, upon a certain ordinance then pending before said council providing for the confirmation of the report of the commission for the fixing of the terms of the annexation of South Brooklyn, did vote adversely to the confirmation, they being influenced by money paid to them so to cast their votes against said ordinance.” Only such parts of said charges as are necessary to show their substantial character are here given.

Subsequently, the city council entered upon the hearing of said charges, claiming to act under authority of said Section 225 of the Municipal Code and to be governed in its proceedings by the provisions thereof and claiming to have power thereunder “to issue compulsory process to compel the attendance of persons and the production of books and papers before the council, and such power to compel the giving of testimony by attending witnesses as is conferred on courts of justice.”

In the course of said hearing the general manager of plaintiff, its bookkeepers and some of its directors were called as witnesses and were examined concerning the subject-matter of said charges so on hearing before the council, and each of them testified that he had no knowledge of any such payments having been made by the plaintiff company, and the general manager having been directed to bring with him the books of plaintiff showing such contributions, he testifies that plaintiff had no such books and that it had made no such contributions.

1905.]

Cleveland Electric Co. v. Hitchens et al.

On the 3d day of March an ordinance was passed by the council for the purpose of compelling the production by plaintiff company of its books and papers and requiring it to submit to an inspection thereof by the council, and it is admitted that it is the purpose of the defendants to proceed to an examination and inspection of the books and papers of plaintiff "for the purpose of ascertaining all expenditures made by it relative and pertinent to the charges under investigation by the council of the city of Cleveland." Thereupon the petition herein was filed, and petitioner prays that defendants may be enjoined from enforcing or attempting to enforce any order upon the plaintiff or upon its representatives compelling them to produce plaintiff's books or papers or to permit the inspection thereof by the defendants or any of them for the purposes of obtaining evidence "relevant to the charges under investigation by the council of the city of Cleveland." Defendants have filed answers, and admit the averments of the petition which entitle plaintiff to relief if it be entitled to any relief herein. To these answers plaintiff filed a demurrer, and by agreement of counsel this present hearing is a final hearing in this court.

It is claimed by plaintiff that "The charges state no offense." It is charged against two councilmen that they received bribes, and against others that their votes were "controlled by the Cleveland Electric Illuminating Company by contributions to the individual campaign funds of some of said persons as candidates for office." This court is of opinion that the parts of these charges already cited in this opinion do constitute a charge of misconduct in office.

Plaintiff claims further that the phrase "head of any department or officer" mentioned in Section 225 does not include city councilmen. That section provides that—

"It is hereby made the duty of the mayor to have a general supervision of each department and the officers provided for in this act, and where the mayor has reason to believe that the head of any department or officer has been guilty in the performance of his official duty of bribery, misfeasance, etc., he shall immediately file with the council written charges against said head of department or officer, setting forth," etc.

It is claimed that this section relates only to those officers who are in the executive branch of the government and over whom the mayor has, by the very nature of his office, a supervising authority independent of the statute, but that it was not intended by the Legislature that the mayor should have power to supervise the officers of an independent branch of the government or prefer charges against them; and among other reasons urged, it is said that, independently of this section, the Legislature has provided a complete code for the trial of councilmen for misconduct in office—independently of the provisions of Section 225, to-wit. Sections 989 to 993 inclusive, of said code. The substance of these provisions, omitting unnecessary words, is that—

“On complaint under oath filed with the probate judge of the county in which the corporation is situated by any elector of the corporation, signed by and approved by four other electors thereof, charging that any member of the council has received any compensation for his services as councilman or has been guilty of misfeasance in office, such probate judge shall issue citations to such party for his appearance before him within ten days, and also furnish the accused and the city solicitor with a copy of such complaint. On the day fixed for the return of the citation a time shall be set for hearing the case, and, if a jury be demanded, the judge shall direct the summoning of twelve men, and on the trial it shall be the duty of the solicitor to appear for the prosecution, and the accused may appear by counsel. If the charges in the complaint are sustained on the trial, such judge shall make an order removing such officer from office.”

Here seems to be provided complete legislation for making charges in case of misfeasance, and for trial before a judge and jury. The entire provision is in harmony with our ideas of the manner in which causes shall be heard.

On the other hand, to hold that Section 225 applies to councilmen involves more than one objection. In the first place, it provides for the filing of charges by an executive officer against legislative officers, which is in conflict with the spirit of the legislation of the English speaking race, which everywhere regards it as a fundamental principle of good government that the legislative and executive departments shall be kept as dis-

1905.]

Cleveland Electric Co. v. Hitchens et al.

tinct and as independent as possible. Moreover, if this provision applies to councilmen, then it provides that a councilman may be tried by his fellow councilmen. A municipal council almost everywhere and almost always is to a degree a political body. Its members meet often in the council chamber and in committee work, and close friendships and sharp rivalries and bitter hostilities arise, so that the trial of a councilman before the council means that he may be tried by a body of men who may be his political adversaries, possibly his personal enemies. Or, the reverse may be true, they may be closely allied to him for political and personal reasons. Most of the members of a city council could not qualify as jurors in a court of justice in a case either civil or criminal in which a fellow-councilman was a party, for by reason either of close friendship or of a not very friendly attitude he would not be such a disinterested trier as should sit in hearing that cause.

It may be said as to this that the statutes have provided in Section 121 of the Municipal Code that "Council may punish or expel any member for disorderly conduct or violation of its rules, and declare his seat vacant by absence without valid excuse," but manifestly this is a provision intended to enable the council to preserve decency and decorum in the council chamber during the course of the proceedings.

Inasmuch, then, as the Legislature has made complete provision for the trial of such charges as those we are considering in a tribunal organized for the trial of causes as causes should be tried, and inasmuch as the language of Section 225 does not clearly include councilmen among the officers therein mentioned, and inasmuch as a construction of this section to include councilmen involves the objections before mentioned, the court is of opinion that said Section 225. does not include city councilmen as persons against whom charges may be filed and heard.

It is further claimed that plaintiff is entitled to the relief sought herein under the constitutional rule that no person shall be compelled to give evidence against himself which might subject him to a criminal prosecution. It is expressly averred in the charges filed in the city council that "councilmen were con-

trolled by the Cleveland Electric Illuminating Company by contributions to the individual campaign funds of some of said persons as candidates for said offices," and against two of the councilmen there is an express charge that they received bribes, and, while it is not expressly charged that these bribes were paid by the plaintiff or its agents, the pleadings herein, taken as a whole, indicate unmistakably that if these bribes were given they came from persons acting for the plaintiff. It is elementary that—

"The authorities are exceedingly clear that the witness is not bound to answer where it reasonably appears that the answer will have a tendency to expose the witness to a penal liability or to any kind of punishment. Whether it may tend to expose the witness to penalties is a point which the court will determine under all the circumstances of the case. It is not necessary that the witness should expressly say that the answer would criminate him if this is clear from the nature of the question.

"It is the privilege of a witness to refuse to answer any question which might tend to expose him to any kind of punishment. This privilege extends to such matters as will have any tendency to criminate him.

"This constitutional provision is not limited to cases where witnesses might be called to testify in criminal prosecutions against themselves. The privilege is as broad as the mischief against which it seeks to guard and insures that a person shall not be compelled when acting as a witness in any investigation to give testimony which may tend to show that he himself has committed a crime." 142 U. S., 562.

"When a question is asked, it is for the court to determine whether any possible answer to it might tend to criminate the witness.

"Constitutional provisions for the security of person and property should be liberally construed." 116 U. S., 616.

Such are the constitutional provisions for the protection of all persons, which is invoked herein by the plaintiff for its protection against being required to submit its books and papers to a general inspection in the hearing which is had of the charges before mentioned. Those charges are, substantially, that certain public officers were guilty of misfeasance or perhaps of crime in accepting bribes from the plaintiff company.

1905.]

Cleveland Electric Co. v. Hitchens et al.

It is admitted that the purpose of investigating the books and papers of the plaintiff is to obtain evidence tending to substantiate these charges against these councilmen. If these books or papers tend in any way to substantiate the charges against the councilmen, it is manifest that they do tend to incriminate the plaintiff, its officers, agents or employes, for, if the councilmen have been guilty, the plaintiff's representatives must have been under the law equally guilty. If the papers of the plaintiff were produced and were inspected, one of two things would result: First, they would show nothing tending to substantiate the charges against the councilmen; or, second, they would tend to substantiate those charges. If they in no wise tended to substantiate the charges, then their absence from this hearing can in no wise injuriously affect the prosecution. But if, on the other hand, they do tend to sustain those charges, then they do and must tend to criminate the representatives of the plaintiff company.

It being manifest to a court that if these books and papers could tend in any way to be useful to the prosecution in this hearing, they then must tend to subject the plaintiff company or its representatives to penalties and punishment, it becomes the duty of a court to say that, inasmuch as these papers will either show nothing whatever tending to support these charges, or else will show something tending to criminate plaintiff herein, plaintiff should not be required to submit its books and papers to the inspection against which it seeks relief herein.

Other claims have been made by counsel for plaintiff in argument. It is claimed that Section 225 of the Municipal Code is a nullity because no penalty has been provided therein. This claim it is unnecessary to pass upon. It is also claimed that the attempted proceedings complained of herein are in violation of Section 14 of the Bill of Rights of the state of Ohio, which provides that "The right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated." This is Section 4 of the Constitution of the United States, and while that provision is a limitation only upon the federal government, the language is the same as that of the constitutional provision

of Ohio, and therefore the reasoning of the United States courts concerning it is applicable here. The principles enunciated in *Bond v. United States*, 116 U. S., 616, and the reasoning in the majority opinion in that case, would perhaps warrant a court in holding that the inspection sought to be had herein is an "unreasonable search." But it is likewise unnecessary to pass upon this claim.

The court, therefore, does not pass upon either of the claims of plaintiff, first, that Section 225 of the Municipal Code is a nullity; or, second, that plaintiff is entitled to an injunction because that which is sought by the defendants to do constitutes an "unreasonable search" under the provisions of the Constitution, and the court does not pass upon those claims because, as already indicated, the court is of opinion that plaintiff is entitled to an injunction, first, because Section 225 does not warrant the filing of charges against and the trial of councilmen; second, because the acts complained of herein do constitute an attempt to compel the production of papers which must be either irrelevant to the charges in question, or else tend, while supporting these charges, to also incriminate the persons whose papers were produced and inspected.

Perpetual injunction allowed as prayed for.

Defendants except, and give notice of their intention to appeal to the circuit court.

Squire, Sanders & Dempsey and *T. H. Hogsett*, for plaintiff.

Baker, Estep, Payer, Adams & Carey, City Solicitors, for defendants.

1906.]

Jiha v. Barry, Sheriff.

**AUTHORITY OF DIRECTOR OF CHARITY AND CORRECTION
TO DISCHARGE PRISONER.**

[Common Pleas Court of Cuyahoga County.]

**GEORGE JIHA v. EDWIN D. BARRY, AS SHERIFF
OF CUYAHOGA COUNTY.**

Decided, December, 1901.

Release of Prisoner from Workhouse—Under Section 1547-67—Regulations Necessary to Make Valid—Approval of Mayor—Limitations on Authority of a Director of Charities and Correction—Invalid Release—Impinging on Pardoning Power and Judicial Power—State and County Prisoners—Habeas Corpus.

1. The director of charities and correction under the "Cleveland Federal plan" is clothed with power to discharge a prisoner from the workhouse only where the question involved in his discharge is the propriety of retaining him in confinement—that is, a question of humanity, as distinguished from one of grace, which belongs to the pardoning power; or a question of the propriety of retaining him in custody as distinguished from the propriety of committing him to custody, or as to whether his sentence is properly proportioned to his guilt.
2. Such discharge can only be made upon the approval of the mayor, and under such regulations as may be provided by law or ordinance, and in the absence of a regulating statute or ordinance the discharge is invalid.
3. But the failure of the mayor to endorse his approval of the discharge may be cured by a subsequent endorsement thereof, provided the proceedings are otherwise regular.
4. It is not probable that the Legislature intended to grant power to a director of charities and correction to interfere at all with sentences imposed by the court of common pleas in county or state cases, as distinguished from sentences imposed by the municipal court.
5. The release of a prisoner under a mistake as to the authority of the officer ordering his release is equivalent to a negligent escape, and a prisoner so released may be retaken and returned to custody.

DISSETTE, J.

This is an action in *habeas corpus* brought by one George Jiha against Edwin D. Barry, as sheriff of Cuyahoga County,

in which he complains that at the September Term, 1901, of this court, he was tried and found guilty of the misdemeanor of assault and battery; that on or about the 29th day of October, 1901, the Honorable George L. Phillips, the trial judge of said cause, sentenced him to pay a fine of \$20 and costs, and that the costs amounted to the sum of \$293, and that he was committed to serve sixty days in the workhouse of the city of Cleveland and to pay said fine and costs; that he entered on serving of said sentence in the workhouse, on or about the 29th day of October, 1901, and that thereafter, on or about the 9th day of November, 1901, by and through the consideration of the director of charities and correction of said city of Cleveland, and with the approval of the duly elected, qualified and acting mayor of the city of Cleveland, he was ordered released and discharged from said workhouse, he not having been committed to said workhouse under the provisions of Section 2100c of the Revised Statutes; that afterwards, to-wit, on or about the 19th day of November, 1901, the defendant, Edwin D. Barry, seized the body of said petitioner, without any trial or hearing being had and without any warrant, information or indictment preferred, found or charged against him by any duly constituted court, tribunal, officer, person or authority whatsoever, and imprisoned him in the county jail of Cuyahoga county, Ohio; that he is now restrained of his liberty and is imprisoned in the Cuyahoga county jail by said defendant. He says that he is unlawfully restrained of his liberty by said defendant, and annexes to his petition a copy of the commitment, marked "Exhibit A," and asks that a writ of habeas corpus may be granted and that he may be discharged from such unlawful imprisonment.

The copy of the commitment commands the sheriff of Cuyahoga county to take the relator, if he be found within the bailwick of the sheriff, and bring him before the court of common pleas forthwith, to abide the further order of the court, on a verdict of guilty of an assault and battery on an indictment against him for assault with intent to kill.

The defendant, the sheriff of Cuyahoga county, for answer to the petition of the relator, admits that he is the sheriff of

1905.]

Jiha v. Barry, Sheriff.

Cuyahoga county, state of Ohio, and alleges that on September 29th, 1900, the grand jury returned an indictment against said George Jiha, for the crime of assault with intent to kill; that the said George Jiha, at the September Term of this court, 1901, was placed on trial upon said indictment, before the Honorable George L. Phillips as judge of the court of common pleas of said county, and a jury duly impaneled and sworn; that after hearing the evidence in said case and due consideration, the jury returned a verdict of guilty of assault and battery, as contained in said indictment, upon which said court rendered judgment, which judgment and verdict remains unreversed, and in full force, effect and virtue in law.

That on the 29th day of October, 1901, said George Jiha was sentenced by the court to be imprisoned in the workhouse in the city of Cleveland, under the rules, regulations and discipline thereof for the term of sixty days, and to pay a fine of \$20 and costs of said prosecution, and that he stand committed until said fine and costs are paid or secured to be paid, or until otherwise discharged by due course of law, and he attaches a copy of the said sentence to his answer. That an order of commitment was duly executed by said court and that on or about the 29th day of October, 1901, the said Jiha was committed to said workhouse and began serving the sentence aforesaid. That one Harris R. Cooley was, on said 9th day of November, 1901, the duly appointed, qualified and acting director of charities of the city of Cleveland; that on or about that day the said Harris R. Cooley, in his official capacity as director of charities, without the approval of the Honorable Tom L. Johnson, the duly elected, qualified and acting mayor of the city of Cleveland, and contrary to law, did discharge the said George Jiha from said workhouse from further service of said sentence of said court, and that said Jiha was discharged and released and given his liberty there and then, and that said pretended discharge was and is unauthorized, illegal and void, for the following reasons:

1. That said Cooley, as such director, assumed to order said discharge and did order the same, acting alone and without the approval of the mayor, whereas, the power to discharge is vested in the director and the mayor acting together and concurrently.

2. Said discharge was not made or ordered upon any ground, or for any cause upon which the said director and mayor are by law authorized and empowered to discharge prisoners from said workhouse.

And he says that afterwards, to-wit, on the 19th day of November, 1901, by order of the Honorable T. K. Dissette, as judge of the court of common pleas of said county, a *capias* was issued for the arrest of said Jiha and directed to the said Edwin D. Barry, sheriff of said county, directing the said sheriff to arrest the said Jiha and have him before said court to abide the further order of the court, a copy of which *capias* is attached to this answer and marked "Exhibit B."

And defendant says that in pursuance of said order of said court and *capias* he arrested the said Jiha, and that he now has the said Jiha in his custody as sheriff of Cuyahoga county, Ohio. He denies that he seized the body of said Jiha without authority, as alleged or attempted to be alleged in plaintiff's petition, but that he was seized under and by virtue of the authority aforesaid; and he denies that the said Jiha is unlawfully restrained of his liberty as set forth in said petition, and prays that the said Jiha may be remanded to his care, custody and control, under and by virtue of said order; that said writ of *habeas corpus* may be quashed; that the petition herein may be dismissed and the costs of this proceeding adjudged against the petitioner, and for such other relief as is equitable and proper.

The plaintiff was brought before this court and admitted to bail pending the proceedings and decision of the court. On the hearing of the case the relator furnished the record of discharges kept by the director of charities, which contained the mayor's approval and the statement of the director giving his reason for the discharge of the prisoner in the following language: "To give him another chance."

Counsel for the respondent objected to this record and sought to impeach it by showing that the approval of the mayor was entered upon it subsequent to the discharge of the relator. This court at the time did not deem it very important when or at what time the mayor endorsed his approval of the act

1905.]

Jiha v. Parry, Sheriff.

of the director, holding that while it was proper and regular that the approval of the mayor should be endorsed before the discharge, yet if it was actually made afterwards, it was curative and would not invalidate the discharge, if otherwise regular.

There is nothing in the application of the relator that shows that the fine and costs imposed by the court were paid by him or secured to be paid, and there was no contention made that such had been done.

The main contention in this case on the part of the relator is that the director of charities and correction had full power under the statutes to grant the discharge here in question, and that the relator was lawfully at large. Section 1545-67 of the Ohio statutes, in what is commonly known as the Cleveland Federal plan act, says:

“The director of charities and correction shall have the charge and administration of the workhouse, house of refuge and correction,, cemeteries and infirmary, and all charitable or penal institutions established by such city. He shall, subject to the approval of the mayor of such city, make such rules and regulations as are necessary and proper for the employment, discipline, instruction, education, reformation and for the conditional release and return of all the prisoners confined under the provisions of law, and shall, from time to time, with the approval of the mayor, make such alterations, amendments and additions to the rules and regulations for the government of prisoners in the workhouse as shall seem to him to best promote their reformation. He may with the approval of the mayor, and under such regulations as may be provided by law or ordinance, discharge any person committed to the workhouse, except such as are committed under the provisions of Section 2100c of this act, and any infant committed to the house of refuge and correction; but a record thereof shall be kept by him and reported by the mayor to the council in his annual report, with a brief statement of the reasons therefor.”

Section 1545-68 provides as follows:

“The director of charities and correction shall have all the powers and perform all the duties which are by law or ordinance vested in or required of the board of workhouse directors * * * and all laws and ordinances relating to work-

houses, houses of refuge and correction, cemeteries and infirmaries in such cities shall apply to said department and be enforced by said director, except as herein otherwise provided."

Section 2102, of the Revised Statutes, in defining the power of the board of workhouse directors, says:

"The board shall have the power to discharge, for good and sufficient cause, a person committed to such workhouse; but a record of all such discharges shall be kept and reported to the council, in the annual report of the board, with a brief statement of the reasons therefor."

It will be noticed that this section provides: (1) That the workhouse board may discharge for good and sufficient cause; (2) That a record of the discharge must be kept and reported annually to the council, and (3) That this report must contain a brief statement of the reasons therefor.

The Cleveland Federal plan act (Section 1545-67, Revised Statutes), gives the director of charities and correction all the powers and duties of the workhouse board and provides that all laws and ordinances relating to workhouses shall apply, except as herein otherwise provided.

It is a general rule of statutory construction, that where there is both a special and a general act, the special act controls where applicable.

Section 1545-67, of the Revised Statutes, provides that the director of charities and correction—

"(1) * * * may, with the approval of the mayor, and under such regulations as may be provided by law or ordinance, discharge any person committed to the workhouse," except habitual criminals and infants. (This evidently takes the place of the first clause of Section 2102.)

(2) A record thereof must be kept and reported annually to the council. (This takes the place of the second clause of Section 2102.)

(3) This report must contain "a brief statement of the reasons therefor." (This is verbatim the third clause of Section 2102.)

1905.]

Jiha v. Barry, Sheriff.

Manifestly here is a special provision regulating the discharge of prisoners from the Cleveland workhouse, and differing from those in Section 2102. Therefore, by the express terms of Section 1545-67 as well as under the general rule of statutory construction above referred to, the director of charities and correction can discharge workhouse prisoners only on the conditions of Section 1545-67. These conditions are, that it be done, first, with the approval of the mayor; second, under such regulations as may be provided by law or ordinance. Each of these provisions is a prerequisite of a valid discharge. The enactment of regulations governing discharges, either by law or by ordinance, is a prerequisite of a valid discharge by the Cleveland director of charities and correction. No such regulations have been prescribed by law, for the reasons before given. Section 2102 can not be regarded as such a regulation, and no other statute has been pointed out. No ordinance on the subject is claimed to exist, hence no regulation has been provided, either by law or ordinance.

It was contended on the part of the relator that the statute, having conferred the power and no ordinance or statute having been passed prescribing regulations, that the director of charities had the power to discharge and could exercise it in the absence of such regulations. We think that the intention of this section is that he shall only exercise the power under such regulations as may be provided by law or ordinance, and that in the absence of any such regulations, there can be no valid discharge.

But suppose that the director of charities and correction has the power to discharge, for good and sufficient cause, conferred on the board of workhouse directors by Section 2102, and that he can exercise this power, in the absence of regulations provided by law or ordinance. Does this give him power to discharge at will or whim or "to give a man another chance?"

It is a fundamental American rule of statutory construction that, if possible, such a construction shall be given a statute as to make it constitutional. It is self-evident that the Legislature can not give an executive officer like the director of chari-

ties and correction the judicial power to review convictions and sentences on the facts or law and to determine whether the convictions were right or wrong, or the sentences properly proportioned to the guilt.

Since the director of charities and the mayor can not review the judgment of the court that commits a convict, it follows that they can not discharge for any cause that existed at the time of sentences and that properly entered into the consideration of the trial or sentence, and since they can not exercise the pardoning power, but can discharge only "for good and sufficient cause," it follows that the *cause* for discharge must be found in some fact or circumstance that either supervenes the commitment or that did not enter into the conviction or sentence.

I am clear, that the provisions of the law for the discharge of a convict from the workhouse relate exclusively to conditions which may affect the *propriety of retaining him in confinement*, and not to the *propriety of his commitment*. When a man has been legally tried and committed, the propriety of his commitment has been judicially determined, and is foreclosed. I am equally clear, that the power to discharge is not only distinct from the pardoning power, and distinct from judicial power, but that it can be exercised only when it affirmatively appears that it is exercised upon ground that does not impinge upon the pardoning power or upon the judicial power. In other words, when the power to discharge is exercised, it must affirmatively appear that its exercise has been based upon ground that authorizes it; otherwise, its exercise is a nullity.

The discharge from the workhouse is not a *legal* right that belongs to any convict, for he has had all his legal rights in his trial; and such discharge is not a matter of *grace*, for that belongs only to the governor. It is an act of *humanity*, and can be authorized only in cases where a condition has arisen that makes the further confinement of the convict *inhumane*. This, of course, restricts the discharge of workhouse convicts to few and exceptional cases.

1905.]

Jiha v. Barry, Sheriff.

A power to remit a punishment of imprisonment at the will or whim of the officer given the power falls within every definition of the pardoning power.

By Section 2, Article III of the Constitution, the whole pardoning power, except as to treason and cases of impeachment, is vested in the governor exclusively, and can not be exercised directly or indirectly by any other authority.

In *United States v. Wilson*, 7 Peters, 150, the court defines what a pardon is:

“A pardon is an act of grace proceeding from the power entrusted with the execution of the law which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.

“A pardon” (according to Bouvier’s Law Dictionary) “discharges the individual designated from all or some specified penal consequences of his crime. It may be full or partial, absolute or conditional.”

In Abbott’s Law Dictionary, it is defined as—

“Governmental forgiveness of an offense; authorized remission of a punishment for crime; the executive act by which a convict may be released from penal duties.”

And the same authority says that—

“Pardon permanently discharges the individual designated from all or some specified penal consequences of his crime.”

Black’s Law Dictionary defines a pardon as follows:

“An act of grace proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed.”

Where, as is the case in Ohio, the Constitution gives the pardoning power to the governor (Constitution of 1851, Article III, Section 11) this power can not be conferred by the Legislature on others.

This is the doctrine held by our own Supreme Court, or rather assumed to be the doctrine by our Supreme Court, in two cases, in the case of *Ex parte Scott*, 9 O. S., 58, and in

the case of *The State, ex rel Attorney-General, v. Peters*, 43 O. S., 629.

In the former case the statute giving the benefit of the insolvent laws for persons imprisoned for non-payment of fine was under consideration, and the court held that it was not an exercise of the pardoning power for the Legislature to confer such benefits; and in the latter case, where the contention was for shortening the time of imprisonment made by the Legislature, the court held that this provision related only to the discipline and regulations of the penitentiary and that to permit managers of the penitentiary to parol prisoners is an effort to reform them because, when paroled, they are still in the eye of the law in the penitentiary, in the custody of the managers and subject to their will at any time to be replaced within the walls.

A careful study of the guarded language and of the reasoning of the court in this last case can leave no doubt that the court would have held that the power to grant at will or whim an absolute, final or unconditional remission of a sentence to be an exercise of the pardoning power.

Again, it has been repeatedly said by our Supreme Court, that no one can dispute that under Article II, Section 26 of the Ohio Constitution of 1851, the Legislature can not make that criminal in one county of the state which was innocent in another, nor inflict a punishment for an act in one county different than that inflictible in another county.

In the case of *Ex parte Van Hagan*, 25 O. S., 426, in commenting upon Article II, Section 26 of the Constitution, which provides that all laws of a general nature shall have a uniform operation throughout the state, the court says:

"Crime, by whatever name it may be called, or however it may be defined by an act of the General Assembly, will be of the same *nature* in every part of the state."

In *Cass v. Dillon*, 2 O. S., 617, the court says:

"The origin of this section (of the Constitution) is perfectly known. The Legislature had often made it a crime to do in one county or even township what was perfectly lawful to do

1905.]

Jiha v. Barry, Sheriff.

elsewhere, and had provided that acts, even for the punishment of offenses, should be in force or not in certain localities as the electors thereof might respectively decide. It was to remedy this evil and to prevent its recurrence that this section (of the Constitution) was framed."

In *Ex parte Falk*, 42 O. S., 636, a like reasoning was adopted.

It is difficult to distinguish such statutes as the one under consideration from one by which in one county a man is committed to jail on conviction of a misdemeanor, there to stay until the sentence has been fully carried out or he has received a pardon from the governor, while in another county, on conviction of the same offense, he may be released the moment he enters the workhouse, at the will or whim of the director of charities and correction. We are unwilling to give such a construction to Section 2102 of the Revised Statutes, and, holding as we do, that the director of charities and correction, in the absence of such regulations as the statute contemplates, by law or ordinance, has no authority to discharge prisoners committed to the workhouse, we must also hold that this discharge is invalid. But, assuming that the Legislature conferred the power and that, so far as the statute is concerned, the director of charities is clothed with power in the absence of such regulations, then we should hold that the Legislature had no power itself to confer any such authority upon the director of charities, because a power to remit the punishment of imprisonment at the will or whim of the officer given the power, falls within every definition of the pardoning power; the Legislature itself could not everise the pardoning power nor confer the authority to exercise it upon the director, and if it did, if the Legislature had the power, the statute clothing the director of charities with power and authority to release, in this county, would be special legislation on a subject of a general nature and would be unconstitutional. So that we are compelled to hold that the discharge of the relator from the Cleveland workhouse by the director of charities was a discharge without authority of law.

Now, we come to the next contention of the relator, that even though we should find that he was unlawfully discharged from

the workhouse, the fact that he was discharged by one who seemed to be clothed with statutory authority to discharge him, he can not be retaken by the sheriff and recommitted to the workhouse; that he is not responsible for the mistake of the director of charities, and that he can not be treated as a fugitive from justice or an escaped prisoner.

The authorities define an escape as either wilful or voluntary. An escape is where a person, lawfully restrained of liberty, either violently or privily, evades such arrest and restraint, or is suffered to go at large before delivered by due course of law.

There are two kinds of escape, one wilful or voluntary—that is, by consent or default of the officer—the other negligent.

A criminal who has been voluntarily permitted by an officer to escape, may be rearrested by him, or others on the same or a new warrant. When retaken, except in capital cases, after the time for execution has passed, there need be no new award of judgment; but he must be required to serve out his term, not counting the time he was at large, even though the time since the beginning of the imprisonment has gone by.

Again, if he has not served out the fine and costs—for these are a part of the punishment—he may be retaken.

In 21 O. S., 414, it was determined that in that particular case a pardon by the governor did not remit the costs which the prisoner had been adjudged to pay, because, in terms, the pardon did not refer to the costs.

There is no allegation in the petition that the relator served out the fine and costs.

In the case of *Bass v. State*, 29 Ark., 142, the officer, a constable, released the prisoner on the order of the justice of the peace who issued the warrant, and who had taken bail, which he had no power to take, it being a capital case; and in the case of *Meehan v. State*, 46 N. J. Law, 355, where the keeper of a house of correction released the prisoner on the order of the committing magistrate, it was held that while it was not a voluntary escape, because done under a mistake of law, it was a negligent escape.

1905.]

Jiha v. Barry, Sheriff.

There are numerous holdings to the effect that in case of civil arrest, a release on order of a court without power is an escape.

While authorities differ as to whether it is a voluntary or a negligent escape, when an officer permits a prisoner to go free under a mistake as to the authority of the magistrate making the order for the release, all agree that such release is an escape.

The court is strongly inclined to believe that the Legislature never intended to grant power to the director of charities and corrections to interfere at all with the sentences imposed by the court of common pleas in county or state cases as distinguished from the sentences imposed by the municipal court. It is made the duty of the mayor, in the act in question, to make a report to the council annually of the discharge of such prisoners as may have been released from the workhouse, and he is required to give a brief reason therefor. Certainly the city council has no jurisdiction in state or county cases, and the fact that this report is to be made to the city council would seem to indicate that the discharges which the mayor is required to report annually and give his reasons for such discharges are only those that the council of the municipality may have jurisdiction over.

The relator will, therefore, be remanded to the care, custody and control of the sheriff of Cuyahoga county, the writ hereinbefore issued to be quashed, the petition dismissed and the costs adjudged against the relator.

E. M. Heisley and Max P. Goodman, for the relator.

Harvey Keeler, Prosecuting Attorney, for the respondent.

NOTE.—The case of *Jiha v. Barry, Sheriff*, was affirmed by the circuit court without an opinion, January 26, 1903. Judge Caldwell, who rendered the decision of the court, said:

“We have carefully examined the opinion in this case in the court of common pleas and we come to the same conclusion that Judge Dissette came to in that case, and we think we can not give any better reasons than were given in that opinion.”

TAXATION OF PARTNERSHIP PROPERTY.

[Common Pleas Court of Franklin County.]

JOSEPH E. BARRICKLOW v. WILLIS G. BOWLAND, AS
TREASURER, ETC., ET AL.

Decided, April 18, 1905.

Partnership—Association in Business and Property Interests Constituting—Taxation of Partnership Property—Injunction Against Separate Listing of Individual Interest Therein.

Association in a joint enterprise under conditions like those presented at bar constitutes a partnership, and the securities owned are properly listed for taxation in the township where the managing partner resides; and an attempt to place a part thereof on the tax duplicate of the township wherein the other partner resides may be enjoined.

RATHMELL, J.

In this action the plaintiff seeks an injunction restraining the treasurer from collecting taxes on certain property added to the tax list by the auditor for the years 1898 to 1903, inclusive, and to have same stricken from the duplicate.

The petition recites that the auditor upon a hearing before him added to the duplicate for each of said years, a large amount of property, and certified same to the treasurer upon which a tax of \$4,147.12 is claimed. The claim of the plaintiff is that the property sought to be taxed here is partnership property which has been listed for taxation in Harrison county, Ohio, by the managing partner.

The claim of the defendants is that the members of said alleged firm, Joseph E. Barricklow and H. S. Barricklow, are joint owners of said property, which consists of promissory notes, evidencing money loaned by them in Franklin county, and not partners, and taxable in this county, and that unless restrained, he, the treasurer, will proceed to collect the same by legal process and with the auditor's claim of compensation of four per cent.

1905.]

Barricklow v. Bowland, Treasurer, et al.

The issue presented here is as to the character of this holding. By Revised Statutes, 2734, it is provided that the property of every company, firm or corporation shall be listed by the president or principal accounting officer, partner or agent thereof, and by Section 2735, that every person required to list property on behalf of others, to list the same in the same township, city or village in which he would be required to list it if such property were his own, but he shall list it separately from his own, specifying in each case the name of the person, company, and so forth, to whom it belongs.

It appears from the evidence that after the death of the father of the Barricklow brothers in 1875 they attempted to divide their interests in the estate, but before that was concluded an agreement was made between them to handle their interests together, to loan their money, run their farms, and each was to put in like amounts made on the outside and any drawn out to be of like amounts. In this arrangement H. S. was to be the manager. Their transactions from that time on were conducted in the firm name of H. S. & J. E. Barricklow; their profits were to be shared equally and their losses, if any, the same. They inherited some money subsequently, and each contributed to the firm a like amount. Additional land was purchased in the firm name, and their loans evidenced by notes secured by mortgages on real estate in this county, were made in the firm name and conducted by the managing member from Cadiz township, Harrison county. They counseled each other in the investments and denominated their relation as partners.

Bates in his Law of Partnership gives the following definition:

“A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals for the purpose of joint profit.”

And on page 17 he says:

“To determine whether the relation between persons constitutes a partnership their intention in forming it governs.”

The 17th Encyclopædia of Law, page 630, under head of "What Constitutes Partnership," gives the following:

"In general, community of interest, a sharing in the profits and losses as such, the existence of the mutual relationship of principal and agent, and an intention on the part of the persons interested, and uniting in the prosecution of the common enterprise to become and act as partners, are the proximate tests as to the existence of a partnership between them."

Counsel for defendants have ably argued that the relation of those brothers was that of joint owners. A careful consideration of the testimony, the nature of the transactions, their language and consistent character, satisfy the court that they answer fully the definition of a partnership, and that it was legal and proper under the statutes to list their securities in the township where their managing partner resided, and that the adding of the same to the tax list in this county was unlawful.

The conclusion reached on the issue of partnership makes it unnecessary to consider the other question—as to whether H. S. Barricklow was such agent of J. E. as required him to list for taxation J. E.'s share of the property held and controlled by him.

Finding of the issues in favor of the plaintiff, and injunction allowed as prayed for, and property stricken from the duplicate.

W. L. Merwine, for plaintiff.

Dyer, Williams & Stouffer, for defendant.

1905.]

Coney Island Co. v. Mitsch, Administrator.

**LIABILITY FOR INJURY TO A GUEST AT A SUMMER
RESORT.**

[Superior Court of Cincinnati, Special Term.]

THE CONEY ISLAND CO. v. JOSEPH MITSCH, SR., ADMINISTRATOR.

Decided, May 1, 1905.

Negligence—At a Summer Resort—Child Killed on Pony Track—Operated by an Independent Contractor—Company Controlling the Resort Liable—Pleading—Charge of Court—Evidence of Distressing Injuries Competent—But Must not Influence Amount of Damages Awarded.

1. The operation of a pony track at a public resort imposes upon the owner of the resort a duty to those who visit the place to see to it that the work is carefully performed, and this duty can not be shifted or delegated to a licensee or independent contractor.
2. In a suit for damages on account of the death of a boy, who was thrown from the back of a pony and dragged around the ring at such a resort, the allegation that the animal given to the boy was vicious and that the servants operating the track were careless or negligent, sufficiently charges that ordinary care was not exercised.
3. Under the Ohio law, the personal representative of a deceased person, who has brought an action for the wrongful death, is a merely nominal party, and a general denial does not traverse his representative capacity. Objection to his bringing the suit must be taken by demurrer, as for want of legal capacity to sue, or by special denial.
4. The danger that a jury may be prejudiced by proof of distressing injuries does deprive a plaintiff of the best proof in support of his allegations, and where in the charge to the jury with reference to the measure of damages, the court distinctly instructs them that recovery can only be had for the pecuniary injury to the next of kin, and that no damages can be awarded for bereavement, mental suffering or as a solace, the previous exhibition of corporeal injuries, or relation of the distressing character of the injuries causing death, does not constitute prejudicial error.

HOFFHEIMER, J.; FERRIS, J., and CALDWELL, J., concur.

Plaintiff in error was defendant below, and defendant in error was plaintiff below.

The action was for wrongful death. The petition, in substance, charged the defendant with operating a summer resort called Coney Island, and with carrying on a pony track in connection therewith. It further charged that Joseph Mitsch, Jr., a boy eleven years old, on or about the 30th day of August, 1899, hired one of its animals; that same was wild, vicious and uncontrollable; that the boy was placed upon said animal; that he became alarmed by its actions, begged to be taken off, which defendants failed to do; that, on the contrary, they struck said animal a vicious blow with a whip, whereupon the animal threw said boy; that his feet caught in the saddle, and that he was dragged around the track, and suffered injuries from which he died. Plaintiff charged that the death was due to the wrongful act, carelessness and neglect of the defendants, their agents and servants; that he left certain next of kin, on whose behalf the action was brought.

The answer of the defendants was a general denial.

1. The plaintiff in error assigns as error the refusal of the court to give special charges Nos. 4, 5, 6 and 7; and also assigns as error the fact that the court in its general charge instructed the jury that the defendant was liable for the negligence of any one connected with the establishment (see the court's general charge, pp. 80, 81, 86, 87, 89, Record).

The special charges are based upon the theory, that as the pony track was let by the Coney Island Co. to an independent contractor, plaintiff in error was not liable under the petition, which averred negligence in defendants' agents and servants. Even if the defendant company let the privilege of the pony track to Mr. Keefe, and retained no control over it save a mere police supervision, as claimed by plaintiff in error, it could not shift responsibility under the facts in this case. It seems the court below tried the case upon the theory that it was fairly governed by the rule laid down in *Covington & Cincinnati Bridge Co. v. Steinbock & Patrick*, 61 O. S., 215. We are of opinion that this view of the case was warranted by the facts. The first syllabus of that case is as follows:

"Where danger to others is likely to attend the doing of certain work unless care is observed, the person having it to do is

1905.]

Coney Island Co. v. Mitsch, Administrator.

under a duty to see that it is done with reasonable care, and can not by the employment of an independent contractor relieve himself from liability for injuries resulting to others from the negligence of the contractor or his servants."

At page 222 the court says:

"That the rule that a person letting out work is not liable for injuries to others is subject to important exceptions. One of these is, where from the nature and character of the work the employer is under a duty to others to see that it is carefully performed."

And at page 223 the court further says:

"The weight of reason and authority is to the effect, that where a party is under a duty to the public, or a third person, to see that a work he is about to do, or have done, is carefully performed, so as to avoid injury to others, he can not by letting it to a contractor avoid his liability, in case it is negligently done, to the injury of another."

We think a pony track from its very nature is pre-eminently a "work" requiring careful performance, so as to avoid injuring those that come upon the track. Its patrons, as a rule, are *little children*, the invited guests of those who operate the pony track in connection with public resorts, such as was the defendant's. It is a means of entertainment provided for the little ones in particular, and we can conceive of nothing from which more mischievous consequences could arise (as was demonstrated by the facts in the case before us) than a pony track, unless precautionary measures are taken as to the selection of the animals, the servants having them under their control and management, and as to the arrangements generally. The law imposed on defendant company the duty to exercise reasonable care to see that these precautionary measures were adopted, and it was a duty the company could not shift or delegate to another (*Bridge Co. v. Steinbock & Patrick*, 61 O. S., 230; *Railroad v. Morey*, 47 O. S., 207; *Hawver v. Whalen*, 49 O. S., 80). The rule that a person who invites the public to his resort must see that his premises are reasonably safe, and must exercise ordinary prudence and care to render them safe, is set out

in Cooley on Torts, 2d Ed., 718. And notwithstanding the fact that the act causing the injury is attributable to the independent contractor the proprietor of a public resort still owes this duty to his guests (See *Richmond v. Moore*, 94 Va., 493; *Hart v. Washington Park Club*, 157 Ill., 9; *Hallyburton v. Burke County Fair Association*, 118 N. C., 526; *Conradt v. Clauve*, 93 Ind., 476).

The plaintiff in error argues that the *ratio decidendi* of these cases was a failure on the part of the proprietor to *keep the premises safe*; and that as there was no allegation in plaintiff's petition, or proof, that these premises were unsafe, or that Keefe, the contractor, was not a competent or careful person. these cases are not analogous. True, there is no allegation, *in haec verba*, that the premises were unsafe, or that the manager of the track was an incompetent person; still it seems to us that the allegations that the animal was vicious, or that the servants operating the track were careless or negligent, sufficiently charges that ordinary care was not exercised in carrying on this work.

In *Conradt v. Clauve*, 93 Ind., 476, a portion of the fair grounds was set apart for target practice with a gun—a deadly weapon. Plaintiff had no notice of it, and he hitched his horse where, as a result, it was shot and killed; and the court held, that although those engaged in the shooting were not strictly servants of defendants, yet they were acting under their license and permission, and bore such a relation to them as to make defendants liable for not properly controlling the exhibition. The same principle is to be applied here. In the case cited the plaintiff came to the fair grounds without notice of the danger, and the work, from its very character, was one, namely, the use of a deadly weapon, which the defendant ought to have controlled, or in regard to which proper precautionary measures ought to have been taken. The pony track, with balky, or uncontrollable, or vicious animals, or careless operators, was equally liable to become a thing of danger to those patronizing it. Under such circumstances it was necessary for defendant to take precautionary measures to control the pony track, as he would be required to do had there been target prac-

1905.]

Coney Island Co. v. Mitsch, Administrator.

tice upon his grounds (See, also, *Thompson v. Lowell, Lawrence & Haverhill Railroad Co.*, 170 Mass., 577).

There is still another reason why the charge of the court was not prejudicial, or the refusal of the court to give the special charges asked, error. The case below was, as we have already said, tried upon the theory that Keefe, the operator of the pony track, was an independent contractor, and that the case fell within the exception recognized under *Bridge Co. v. Steinbock & Patrick*. By operation of law the defendant was charged with control of the track, and it devolved upon him to exercise the care implied by that control. But the record fairly discloses that *as a matter of fact* the defendant retained control of the track, and not, as claimed by plaintiff in error, a mere police supervision. The testimony of the two Keefes, indeed the testimony of Mr. Paxton himself, the owner or manager of the Coney Island Co., shows that this control over the track was not parted with. At page 78 of the record, Mr. Paxton says, "I exercised a general supervision over the whole place." No matter what the arrangement was as to the furnishing of the ponies and the men to operate the track, or as to the division of the profits, the Coney Island Co. owned the track itself (F. Keefe, record, page 11), and it built the fence around it (G. Keefe, record, page 21). It was operated subject to the Coney Island Co.'s rules "in every respect." The company reserved the right to instruct as to the ponies, and if it objected the contractor had to take them off. Keefe had the management subject to the instructions of the general manager of the Coney Island Co. (see record, pages 5, 6, 12, 13, 11, 15, 16, 18, 19, 20, 21, 26, 27). Even Mr. Paxton himself, who was the general manager of the company, says:

"The pony track was a part of our entertainment" (record, p. 76). "Q. If you had any doubts ponies were not safe you would make them take them off the track? A. Yes; if I thought so, or that they were overworked, or something of that kind" (record, p. 77).

He also says that he exercised a general supervision of the whole place (record, p. 78), and it was advertised to the public generally (record, p. 78).

Control over the work having been therefore retained and not parted with (ordinarily control is parted with where there is an independent contractor), it would make no difference whether the arrangement with Keefe was that of partner or agent or whether Keefe was merely acting under defendant's license and permission, the relation was such that the defendant would still be liable under the petition for the negligence of those operating this track.

2. It is assigned as error, fatal to the judgment, that defendant in error failed to prove his appointment as administrator. The answer was a general denial, and it was claimed by plaintiff in error that the representative capacity of plaintiff is a *material* and traversable fact, and was put in issue by defendant's answer. This would be true in cases of this character in states where damages arising from wrongful death survive and become a part of the estate of the deceased, and are inherited from the estate by the named beneficiaries as heirs. But such is not the case in Ohio, therefore the authorities cited by plaintiff in error are not in point. The *personal representative* of a deceased who brings an action under our statutes for wrongful death is a *mere nominal* party (*Wolf, Admr., v. The Lake Erie & Western Railroad Co.*, 55 O. S., 517). A general denial does not traverse the representative capacity of plaintiff. Objection to his bringing the suit must be taken by demurrer, as for want of legal capacity to sue, or by special denial. Any objection must, therefore, be taken as waived.

3. Exception was also taken to the court's charge as to the measure of damage, but we think the law was fairly stated under *Grotenkemper v. Harris*, 25 O. S., 510; *Street Railroad v. Altmeier*, 60 O. S., 10.

4. The fact of the death of the boy, and the proximate cause thereof being admitted, it is urged that the court erred in admitting testimony as to the character of the injuries and the condition of the body after the accident. The objection was made (see record, p. 33) after part of the injuries had already been described to the jury. The court overruled the objection, and some further description as to the injuries (see record, p. 34) was permitted, on the ground that it was part of the *res*

1905.]

Coney Island Co. v. Mitsch, Administrator.

gesta. It will be noticed that one of the averments in plaintiff's petition is to the effect that the boy was "dragged clear around the track." It is urged that the injuries sustained by the boy are the best proof of this particular allegation. Of course, there is always a danger that a jury may be prejudiced by proof of distressing injuries. Still, if that proof is necessary, we do not see why a party should be deprived of it. Speaking of unfair prejudice to civil defendants in personal injury cases, because of the exhibition of corporeal injuries by one suing for compensation, Wigmore in his recent work says:

"No doubt there is in such cases a constant tendency to render verdicts against defendants regardless of proved culpability; no doubt the danger is of greater frequency here than in the preceding class of cases (unfair prejudice to accused persons); and no doubt the trial court has a discretion, which it should firmly exercise, to prevent the abuse of such a mode of proof, but it seems too rigorous to forbid a party to prove his case by the clearest evidence, and a jury which through violent prejudice would not be restrained by the court's instruction would probably give way to its prejudice even without this evidence" (Wigmore on Evidence, Vol. II, Section 1158.)

In *Lehman v. City of Brooklyn*, 29 Barb., 234, to which we are cited by plaintiff in error, the court said, at page 237:

"There is another serious objection to the judgment. The damages are excessive and unreasonable. The personal wrong done to, or the suffering of the child, have nothing to do with the damages, nor should the anguish and grief of the parents enter into the estimate of the amount to be recovered. The interest which the next of kin have is pecuniary."

In the case under consideration the court (see p. 92, record) in his general charge to the jury cautioned it that the facts must be carefully considered, and in an unprejudiced way, and no matter how distressing the circumstances, if they did not impute negligence, the verdict must be for the defendant. And when the court came to charge the jury on the measure of damages the jury was distinctly told that recovery could only be had for the *pecuniary injury to the next of kin*, and that no

Engelcke, Guardian, v. Engelcke et al. - [Vol. III, N. S.]

damages could be awarded for bereavement, mental suffering or as a solace. Under these conditions we do not think that the plaintiff in error was prejudiced, and we believe the court fairly stated the law.

Upon further investigating the record we are of opinion that the judgment below should be affirmed, with costs.

John R. Schindel and *Robert Ramsey*, for plaintiff in error.
Shay & Cogan, for defendant in error.

**ACCOUNTING AND RECOVERY UPON THE BOND OF AN
ABSENT GUARDIAN.**

[Common Pleas Court of Cuyahoga County.]

LOUIS H. ENGELCKE, GUARDIAN OF AMANDA E. ENGELCKE, v.
KATIE HOPPENSACK ENGELCKE ET AL.

Decided, January 27, 1905.

*Guardian—Becomes a Non-Resident After Approval of Account—Suit
for an Accounting on the Bond—Jurisdiction—Sections 6289 and
6058.*

Where a guardian becomes a non-resident after the approval of his account in the probate court, his successor or wards may go into the common pleas, and under allegations of fraud or mistake in the account may summon the sureties on the bond and proceed with the accounting, and if something is found to be still due from the former guardian, may proceed upon the bond in that action.

BEACOM, J.

In the matter of Louis H. Englecke, guardian of Amanda E. Englecke, v. Katie Hoppensack Englecke, Wm. F. Hoppensack and Justus F. W. Hoppensack, the facts are substantially these:

Defendant, Katie Hoppensack Englecke, was, in 1894, appointed guardian of the person and property of Amanda E. Englecke, a minor, by the probate court of this county, and the two other defendants in this case became sureties upon the guardian's bond.

1905.]

Engelcke, Guardian, v. Engelcke et al.

Subsequently, in 1903, the guardian filed a report in the probate court of her administration of that property, and the report was by that court examined, and was approved, and the defendant, Katie Hoppensack Engelcke, resigned as guardian, and the plaintiff herein, Louis H. Engelcke, was appointed guardian of said minor.

Suit is now brought in this court against the three defendants, the first named of whom was guardian and principal on the guardian's bond, and the other two were sureties; and the proceeding sought here to be instituted is claimed to be that authorized by Section 6289, Revised Statutes, which provides, in substance, that after the settlement has been made in the probate court of the accounts of a guardian, subsequent guardians during the minority of a ward, or the ward himself at any time within two years after such ward arrives at full age, may open and review such settlement, for fraud or manifest mistake, by civil action in the court of common pleas in the county in which such settlement was made.

It appears from the petition, "that the defendant, Katie Hoppensack Engelcke, is without and is a non-resident of the state of Ohio, and without an accounting on the bond the plaintiff would be without relief."

In this suit the bondsmen demur, and questions are raised herein which no court can find a very clear authority for ruling upon either one way or the other, and no court can be certain but that another court may take a different view of these proceedings from that which the court passing upon it does.

It is well settled, on authority of 13 Cir. Ct., 29, that, inasmuch as Katie Hoppensack Engelcke appears from the petition to live without the state of Ohio, no service can be made upon her in this matter. Then the question is, can this action be brought against her bondsmen?

The condition of the bonds was, in substance, that Katie Hoppensack Engelcke should faithfully discharge all of her duties as guardian of the person and property, as the law requires. One of the duties which the law requires her to perform is to make an accounting in the probate court—to

obey the order of that court. That she has done, but, under the statutes, that is only a preliminary matter. Under Section 6289, that is subject to review in this court. In other words, one of the conditions of that bond, and one of the things which this principal and her sureties bind her to do, is that she shall stand ready to come into this court in any proceeding which charges either fraud or manifest mistake in the action in the probate court, at any time during the minority of the ward, or within two years after the ward becomes of age. And the ward himself can bring this action.

It is set forth in the petition that she not only is not here but that she can not be gotten here. It seems to the court that this is a breach of the bond, a breach of its conditions; that she has failed to do one of the things that she stipulated to do and that they have guaranteed in this bond that she will do. The court is, therefore, of opinion that inasmuch as service upon her is impossible, that the conditions of the bond are broken and the sureties may be sued upon the bond and may be brought into an action for accounting.

In 13 Cir. Ct., 29, the court on pages 37 and 38 refer to a case in the Supreme Court of New York, in which it was held that—

“The non-residence of the executor gave to a court of equity jurisdiction upon the bond without the accounting.”

I am of opinion that these bondsmen could only be sued here after an accounting and finding so much money in the hands of the guardian, either in the probate court or subsequently in this court, or in whatever court had final jurisdiction of that subject-matter.

I read from 38 O. S., 436, which is not the syllabus but only the language of the court, and the court was perhaps speaking of a matter not directly involved in the case:

“If an accounting can not be obtained from the guardian in the exercise of the power and jurisdiction of the probate court, we do not deny that an action on the bond against the makers may be prosecuted in a court of equity for an account and other relief.”

1905.]

Engelcke, Guardian, v. Engelcke et al.

The defendants, however, say, first, that an accounting can only be had in the probate court. Of course, that is the language of the statutes, if you only read a small portion of them. Part of the language of Section 6289 is that in a settlement made in the probate court the accounts shall be final between him and his ward until an appeal is taken in the court of common pleas in the manner provided by law. Counsel for defendants cite 3 C. C.—N. S., 410, and numerous other cases which hold that before a surety can be sued you must have a finding of an account due, and they also hold, in certain cases, that the probate court is the proper court in which to have an accounting.

The case in 3 C. C.—N. S., 410, cited by counsel, does not help us very much here. It is, substantially, that a man died, and he having been a guardian, his administrator appointed as administrator under the law, stepped into his shoes as guardian. He found absolutely no accounts of guardianship, but some money and papers and things, which he turned over to the ward, and said, substantially, "I know nothing about this case because there are no records here. All I found, I have given you." Suit was brought in the court of common pleas on the extraordinary proposition that, inasmuch as there were no accounts for the probate court to act on, they could bring their action in the court of common pleas; and the circuit court, on page 418 say, in substance only, that the fact that no accounts were kept did not oust the jurisdiction of the probate court, all of which, of course, was perfectly manifest.

The second objection on the part of the bondsmen is that plaintiff is attempting to unite proceedings which are conflicting; that there is a proceeding here in part equitable and in part legal. That is, that the proceeding for a review of the accounts is equitable, which is right; that the proceeding on the bond is legal, which is right.

Section 5058 provides that the plaintiff may unite several causes of action in the same petition whether they are such as have been denominated legal or equitable when they are included within certain classes, and enumerates the classes. The court will not undertake to say under which heading these two

claims might be placed. Perhaps under number 9, claims against a trustee by virtue of a contract or by operation of law.

But, it is objected that the accounting would be before a referee or a court of equity, and that the bondsmen are entitled, before any judgment can be entered against them, to have a verdict of twelve good and lawful men. There is no trouble about that, I take it. I do not now undertake to indicate what would be the proper method of proceeding in this case, but I understand now an accounting might be taken here and an amount found due, if anything, from this guardian. Section 5130, Revised Statutes, provides, in substance, that issues of fact arising in actions for the recovery of money or specified real or personal property shall be tried by a jury. I take it if any question arises requiring the verdict of a jury, a jury could be impaneled. But it seems the plaintiff, being entitled to come into this court and review what has been done in the other court in this proceeding, having averred that it is impossible to get the principal into this court, she having guaranteed—stipulated in substance—that she would answer in any court that had jurisdiction on that subject-matter, and it appearing from the petition that she can not be served and can not be gotten here, the condition of the bond is broken, and these plaintiffs, who are entitled in some way to get the relief which they seek, are entitled to notify her bondsmen to come in here and take part in this accounting, and if they find something due to them from this principal, they are entitled to proceed against the bond in this action.

The demurrer is overruled; to which defendants except.

Beavis & Johnson, for plaintiff.

T. J. Moffett, for defendants.

1906.]

Ex parte J. H. Schoepf.

**REPORTS OF ACCIDENTS MADE BY CONDUCTORS AND
MOTORMEN.**

[Common Pleas Court of Hamilton County.]

EX PARTE J. H. SCHOEPP.

Decided, November 12, 1904.

Notary Public—Contempt Proceedings Against Witness for Refusal to Answer Questions By—Do not Lie Where Testimony is Hearsay—Reports by Conductors and Motormen of Accidents on the Line—Not Privileged, When—And Must be Produced Under a Subpoena Duces Tecum.

1. A witness will be discharged from custody when arrested during the taking of his deposition for refusing to answer questions which call for hearsay testimony.
2. In an action against a traction company because of an accident on its line, reports of the accident made by the conductor and motorman to the claim agent according to a rule requiring such reports in all cases whether there are grounds for action or not, are not privileged, and must be produced by the claim agent under a subpoena *duces tecum* from a notary public who is taking the former's deposition.

LITTLEFORD, J.

The petitioner, J. H. Schoepf, by his petition in *habeas corpus*, seeks to be discharged from a commitment made by a notary public before whom his deposition was being taken in an action brought by Josephine Pace against the Cincinnati Traction Company, for injuries to the woman, alleged to be the result of an accident on the line of the traction company.

The notary public ordered the arrest of Mr. Schoepf because of his refusal to answer certain questions, and also because of his refusal to produce certain reports of the accident made by the conductor and motorman of the car.

The following are the questions that Mr. Schoepf refused to answer:

“Q. On the 17th day of May, 1902, a woman fell or was thrown off a car belonging to the Cincinnati Traction Company, at or near the corner of Oak and Belmont streets, College Hill. Who was the conductor in charge of this car?”

“Q. Do you know the name of this conductor?”

“Q. Do you know the name of the motorman of this car?”

“Q. Were there any other persons on this car besides the plaintiff, the conductor and the motorman?”

“Q. Were there any persons, that you know of, besides the plaintiff, the conductor and the motorman, present at the time of the accident, and who witnessed it?”

“Q. Who was the division superintendent, in May, 1902, of the division to which the College Hill and Main line belonged?”

There is no claim that Mr. Schoepf was present at the time of this accident, and it is conceded that all of these questions but the last one call for hearsay testimony.

The language of Shauck, J., in deciding *Ex parte Jennings*, 60 O. S., 319, indicates that the Supreme Court of this state does not intend to clothe notaries with the power to compel witnesses to give testimony which the rules of evidence exclude from consideration in a court of justice. For this reason it is the opinion of this court that Mr. Schoepf had the right to refuse to answer the questions referred to.

As to the last question quoted above, inquiring as to the name of the division superintendent in May, 1902, it is the opinion of the court that Mr. Schoepf ought to answer this question. He does not deny that he knows the name of this official. It may be that the name of the division superintendent is an irrelevant matter, but the trial court can better determine that. No harm can result to the defendant from disclosing the names of its officials, and it may conduce to justice being done.

“The exclusion of evidence is generally an evil, and the admission of evidence is generally safe and wise” (*Bell v. Brewster*, 44 O. S., 690, 699).

The next point to be taken up is whether or not the witness is bound to produce the reports in his possession made by the conductor and motorman concerning the accident which was the cause of this suit. It is claimed that the notary has the right to compel the production of these reports under Section 5247. This section is as follows:

“Section 5247. The subpoena shall be directed to a person therein named, requiring him to attend at a particular time and

1905.]

Ex parte J. H. Schoepf.

place, to testify as a witness; and it may contain a clause directing the witness to bring with him any books, writing, or other thing under his control, which he may be compelled to produce as evidence."

Mr. Schoepf testifies that he is claim agent of the company, and that all accidents on the lines of the defendant company must be reported to him by both motorman and conductor, together with the cause thereof. He says this is by order of "the elective officers of the traction company."

If any part of the car gets into a dangerous condition, it is reported to the barn foreman; and daily reports of the condition of every car are made when it is turned in. Accidents only are reported to Mr. Schoepf.

The witness says these reports are made "to advise us of the cause of the trouble," and also for use by the attorneys of the company if suit is brought. He says that a report would have to be made of a collision between two cars even if no one was on the cars except the motorman and conductor, and there was no injury done except to the cars.

It appears, therefore, that those documents are not gotten up as part of the preparation of a case for court, but are reports made by the company's agents in all cases of accidents, according to a rule of the company, to advise it of the cause of the trouble without regard to whether or not there is any possibility of a suit. If a suit is brought, Mr. Schoepf says they are turned over to the lawyers of the company for their use.

Counsel for petitioner objects to the production of these reports on the ground that they are privileged communications. In support of this view several cases are cited.

One of those cases is *Collins v. London Omnibus Company*, 68 L. T. R., 831, in which case the learned court refused to allow the plaintiff in an action for negligence to inspect the report of the accident made by the omnibus driver, holding that it was a privileged communication, and saying "there was abundance in the present case to indicate that the document came into existence for no purpose other than the use of the solicitor in anticipation of this action," etc. The text of the two opinions in the case by Willis, J., and Charles, J., show that in the minds of both learned judges the refusal to order the production of the

report was based on the fact that it had been prepared *solely* for the use of the solicitor to assist him in a prospective suit.

Two of the other cases cited for petitioner, *Southwark, etc., v. Quick*, 38 L. T. R., 28, and *Cossey v. London Company*, L. R., 5 C. P., 146, take the same view. The last case cited, *London Company v. Kirk and Randall*, 51 L. T. R., 599, does not throw any light on the matter one way or the other.

Even upon the authority of the cases cited for the petitioner, therefore, the reports for which Mr. Schoepf is asked here are not privileged.

Of the English cases cited on the other side, the leading one is *Woolley v. North London Railway Company*, L. R., 4 C. P., 602 (1869). It is the first case deciding the question before us, was concurred in by all the members of the bench, and has never been overruled. The decision holding that reports like those here are not privileged and must be produced, was based on the ground that the reports would be made whether there was any cause of action or not, as is said by Smith, J., at page 612. No less an authority than Taylor on Evidence (3d volume, 1186) has relied upon this case to assert that "in an action against a railway company for injuries sustained on their railway, plaintiff may inspect reports descriptive of the accident made in the ordinary discharge of duty by different servants of the company to their general manager," etc.

This leading case was followed by *Parr v. Railway Company*, 24 L. T. N. S., 558; *Skinner v. Great Northern Railway*, L. R., 9 Ex., 298, and *Cook v. North Metropolitan Tramway Company*, 54 J. P., 263. The cases cited by defendant's counsel which are referred to above either follow it or at least do not dissent from it.

Coming to the American cases, although a great array of citations has been industriously collected by counsel on both sides, all of which have been carefully commented on in arguments and briefs by the learned counsel, there is not one case on either side which is even claimed to be just the same sort as the case in hand, and all of those cited as analogous can be distinguished in some way from the case at bar, as has been ably pointed out by counsel in the case.

1905.]

Ex parte J. H. Schoepf.

On the authority of the English cases, therefore, which are well considered and apparently exactly in point, the court is of the opinion that these reports ought to be produced by Mr. Schoepf.

But aside from the English cases, there is good reason why the reports ought to be produced.

It is held in the case of *Rauh*, 65 O. S., 128, that—

“A subpoena issued by a notary public for a witness to attend and testify in a deposition before the notary public may contain a clause directing the witness to bring with him any book, writing or other thing under his control which he may be compelled to produce as evidence,” etc.

This clause “which he may be compelled to produce as evidence,” means which he may be compelled to produce as evidence in court at the trial.

Mr. Schoepf could be required by the plaintiff to appear in court and produce these reports there for use by the plaintiff in the cross-examination of the conductor and motorman: and the reports could become evidence in the case under the following circumstances: If either the conductor or motorman were to make statements upon the stand not consistent with those made in his written report to Mr. Schoepf, the report could be put in evidence by the plaintiff after the witness had admitted that he wrote it. Chase’s Stephen’s Digest of Evidence, Article 132, Am. Note 1.

Counsel for petitioner contends that the only documents which a notary may require a witness to produce are such as a court may require a party to produce for the inspection of the opposite party under Revised Statutes, Section 5290. This section provides that a party is entitled to inspection and copy of books and documents when they contain evidence relating to “the merits of the action or defense.”

There is nothing in the language of the court in deciding the case of *Rauh*, *supra*, to justify the conclusion that the words “which he may be compelled to produce as evidence” mean such as he may be compelled to produce for inspection under Revised Statutes, Section 5290; nor is there any reason apparent to this court why that court should have so meant. But conceding

for the sake of argument that a notary can only require the production of written evidence relating to the "merits of the action or defense," it is the opinion of this court that these reports are that sort of evidence.

It is quite true that they may never be used at the trial, but if this were an objection it might be interposed to the taking of any evidence in the form of depositions. If under the circumstances spoken of above the reports are put in evidence at the trial by the plaintiff, they will be evidence relating to the merits of the action, for they will help to throw light upon how the accident happened.

Counsel for petitioner admits that the production of these reports could be enforced in court by the plaintiff in the action and that they might be put in under the circumstances referred to; but he contends that they could be considered by the jury solely for the purpose of determining the credibility of the man who wrote the report.

With this contention the court can not agree. No human being could read one of these reports if it once got in without taking it as evidence of the way in which the accident happened, as well as evidence bearing upon the credibility of the witness. It would be folly to instruct a jury to consider it for the latter purpose only. They could not shut their eyes to its prohibitive effect as bearing upon the question of the mishap. No authority has been cited by the learned counsel for the petitioner to support this theory of his, and it seems to the court to be unsound.

No opinion is expressed by the court as to whether or not the documents in question here ought to be produced under Revised Statutes, Section 5289, according to "the ordinary rules of proceedings in chancery."

The order of the court, therefore, will be that the question as to whom the division superintendent was, must be answered, and that the reports must be produced.

An entry may be drawn in accordance with the foregoing decision and the costs taxed against the petitioner.

Geo. P. Stimson and Kittredge & Wilby, for petitioner.

Oliver S. Bryant, Jos. Cox, Jr., and Chas. B. Wilby, contra.

1905.]

City of Bellefontaine v. Haviland.

FEES COLLECTED BY MAYORS.

[Common Pleas Court of Logan County.]

THE CITY OF BELLEFONTAINE V. WILLIAM T. HAVILAND.

Decided, March 6, 1905.

Fees—Collected from Defendants Convicted before Mayors—May be Collected by the Mayor, When—Are Payable into the City Treasury—Can be Recovered from the Mayor—Section 1843.

1. Mayors are not authorized to collect fees from defendants in cases of conviction for the violation of ordinances, unless the council shall have first fixed such fees by ordinance, as prescribed in Section 1843 of the Revised Statutes.
2. Where a city has failed to fix the fees, the city can not recover from the mayor fees by him collected.
3. On the passage of the ordinance by the city, fixing the fees of the mayor, as provided in Section 1843, then all fees collected by the mayor are payable into the city treasury, and upon failure of the mayor to so pay, an action can be maintained by the city therefor.

Dow, J.

The city of Bellefontaine, by its solicitor, William W. Riddle, under the provisions of Section 1774, Revised Statutes of Ohio, and by authority of the resolution of the city council, brings this action against William T. Haviland, alleging that the defendant, ever since the first Monday of May, 1903, has been and now is the mayor of said city; that on the 11th of December, 1902, the council thereof passed an ordinance fixing the salary of the mayor in the following terms, to-wit, "the mayor of said city shall receive, in addition to legal fees otherwise authorized by law, a salary of three hundred dollars per annum"; that between the first Monday of May, 1903, and the 14th day of October, 1904, said defendant, as such mayor, received fees or costs from divers persons convicted before him for violation of ordinances, the sum of \$483.60, which costs were the same in amount as authorized by law to be charged by justices of the peace for similar services; that no ordinance was ever passed by the council fixing the costs of the mayor of said city in hearing and determining prosecutions for the

violation of the penal ordinances thereof; that the defendant has wrongfully detained from the treasury of said city said sum of money, and judgment is asked for the amount.

A general demurrer has been filed by the defendant to the petition. Two reasons are given in argument, upon the part of the defendant, why the demurrer should be sustained and the petition dismissed:

First. Because the mayor is authorized by law to collect and retain the fees for which this action is brought.

Second. That if the mayor was without authority to collect the fees sued for, by reason of the failure of council to first fix and determine by ordinance what fees or costs the mayor was authorized to tax against a defendant, then the city is without authority to collect the same from the mayor.

If either of these propositions, claimed by the defendant, is determined in his favor, the demurrer would have to be sustained and the petition dismissed.

We will first examine and determine the second proposition. It is claimed, upon the part of the plaintiff, that under the provisions of Section 126 of the Municipal Code, 96 Ohio Laws, page 61, being Section 1536-633 of the Revised Statutes, that these fees sued for should be paid into the city treasury and that a right of action has accrued to the city therefor. This section reads as follows:

"Council shall fix the salaries of all officers, clerks and employes in the city government except as otherwise provided in this act; and, except as otherwise provided in this act, all fees pertaining to any office shall be paid into the city treasury."

It will be noted that this section provides that all fees pertaining to an office, except as otherwise provided, shall be paid into the city treasury. What fees, under the provisions of this section, if any, pertaining to his office, was the mayor authorized to collect, and, as claimed, should have been paid into the city treasury? Evidently, only such fees as he was authorized, as mayor, to receive or collect. Fees do not pertain to an office for services unless they are prescribed by law.

Clark v. Commissioners, 58 O. S., 107: I read only one sentence from the opinion of the court:

1905.]

City of Bellefontaine v. Haviland.

"It is well settled that a public officer is not entitled to receive pay for services out of the public treasury, unless there is some statute authorizing the same. Services performed for the public where no provision is made by statute for the payment, are regarded as a gratuity or as being compensated by the fees, privileges and emoluments accruing to such officer, in matters pertaining to his office." 3d Nisi Prius, 112.

Section 1536-790, being Section 1843 of the Revised Statutes, prescribes how the mayor's fees shall be fixed, as follows (that is, mayor's fees of cities and villages):

"The costs of the mayor and other officers, in all cases, shall be fixed by ordinance, but in no case greater than the fees for similar services before justices of the peace, and in case of conviction, the fees of officers, jurors and witnesses shall be taxed against the parties convicted, and in case of acquittal of the violation of an ordinance, the costs, except the fees of the mayor and marshal, shall be taxed against the corporation."

It is admitted in paragraph 3 of the petition that no ordinance was ever passed by the council of said city, nor does any ordinance exist in the city, fixing or prescribing the rights or fees of the mayor of the city for his services as such, rendered in hearing and determining prosecutions for violation of penal ordinances of the city.

If the mayor was without authority to tax and collect such costs, unless an ordinance had first been passed, authorizing such taxation and collection, then the city is also without authority to receive and retain such costs, for the same reason.

The fees that the mayor is required to pay into the city treasury under Section 126 of the code, are the legal fees and not the fees collected from defendants without authority of law. I am of the opinion that the mayor was without authority to tax or collect from defendants for violation of ordinances any sum whatever as fees or costs until the council had first determined, by ordinance, the amount he should so tax. If any person is authorized to recover such costs from the mayor, it is the parties who have been illegally required to pay the same.

This case being submitted upon demurrer and the only question necessary to the determination thereof being the right of

the plaintiff to recover upon the averments of the petition, and being of the opinion that the mayor was without authority to tax or collect any such fees until council shall have complied with Section 1843 of the Revised Statutes fixing the fees, I hold that the city is also without authority to collect or receive the same.

The question as to whether the mayors of cities have the right to retain costs collected from defendants in cases for the violation of ordinances, or whether the same should be paid into the city treasury, is one that the court might decline to decide at this time, for the reason that the determination thereof can not affect the judgment upon the demurrer, but, in view of the fact that the city will probably pass the necessary ordinance, fixing the fees of the mayor in ordinance cases, as provided in said Section 1843, now Sub-section 790 of Section 1536, which was unrepealed by the code, then the question will arise whether the costs of the mayor in such cases should be paid into the city treasury, as provided in Section 126 of the code, or whether under the provisions of Section 1751, Revised Statutes, he is entitled to receive the same. This being an important question, I have concluded to pass on this ground of the demurrer as well as the other.

It is claimed, upon the part of the plaintiff that while this section has not been expressly repealed by the code, it has been impliedly repealed by the provisions of Section 126 thereof, the section I have just read; and, upon the part of the defendant, the mayor, it is claimed that said section (126), which provides that "except as otherwise provided in this act, all fees pertaining to an office shall be paid into the city treasury," saves to all mayors all fees under the provisions of Section 1751, which reads that "All fines and forfeitures which may be collected by the mayor, or which may, in any manner come into his hands, and all moneys which may be received by him in his official capacity, other than his fees of office, shall be paid over to the treasury of the corporation weekly." It is also claimed by the defendant that repeals by implication not being favored in law, this section authorizing his retaining the same comes within the exception of Section 126.

1905.]

City of Bellefontaine v. Haviland.

In construing the statute, where the provisions are somewhat conflicting, and in fact in all cases, the court should look to the intention of the Legislature in enacting the same, the evil, if any, sought to be remedied thereby, and in doing this the whole act must be looked to. This, I have found to be no easy task, with so many inconsistent provisions that have found their way into the code by reason of the amendments incorporated into it by the Legislature. If the code had been passed as prepared by Governor Nash and Attorney-General Ellis, no such inconsistencies would have been found.

The powers and duties of the mayors of cities and that of villages are greatly different; they are classified under different sections.

Section 129 of the code is under the classification of cities and the executive officers thereof, and reads:

“The mayor shall be the chief conservator of the peace within the corporation and shall have such other duties and powers as are conferred and required in Sections 1746, 1747 and 1748 of the Revised Statutes of Ohio, such as are provided in this act and all other acts or parts of acts, applying to all cities of the state and not inconsistent herewith.”

And again in Section 231 of the code, after enumerating the sections and parts of sections repealed, in the last sentence of the act, we find these significant words:

“This act shall supersede all acts and parts of acts not herein expressly repealed, which are inconsistent herewith.”

So that the only question to determine in case Section 1843, of the Revised Statutes, being now Sub-section 790, applies to cities, and the council by ordinance shall prescribe the mayor's fees, is, whether Section 1751, Revised Statutes, which has not been expressly repealed, nor expressly incorporated into the code, is inconsistent with the provisions thereof, so far as applicable to the powers and duties of mayors of cities thereunder. After a careful reading of the code, I am of the opinion that the Legislature intended to limit the compensation of mayors of cities to his salary in all cases for violation of ordinance thereof, and that his legal fees should be paid into the city treasury.

Section 126 reads:

“Except as otherwise provided in this act, all fees pertaining to an office shall be paid into the city treasury.”

Section 1751 was not made a part of this act by the code, so far as the government of cities are concerned; but by the authority of Section 200 is expressly limited to the executive powers of the mayors of villages.

Section 200 provides:

“The mayors of villages shall be the chief conservators of the peace within the corporations and shall have such other powers and perform such other duties as are conferred and required in Sections 1746, 1747, 1748, 1750 and 1751, and he shall receive such fees as are prescribed in Section 1843.”

Section 1751, under which it is claimed the mayor is entitled to retain his fees, is not incorporated in the section relating to mayors of cities, but is, in relation to mayors of villages, and authorizes the retaining of fees provided for in Section 1843.

Section 129, relating to the powers and duties of mayors of cities, nowhere authorizes him, in addition to his salary, to receive and retain fees provided in Section 1843, and does not give him the powers mentioned in Section 1751, which is limited to mayors of villages only.

Hence, the conclusion I have arrived at is that while mayors of villages are expressly authorized to retain legal fees, in addition to his salary, mayors of cities, not being so authorized, can not legally retain the same. The reason moving the Legislature to this was to render the judgments of mayors' courts more impartial than they have been in some cities in the state, removing any ground for the imputation of selfish motives in their judgments and sentences.

The cause for differences of opinion upon this question of mayor's fees has greatly grown out of the manner in which the code, as we find it enacted by the Special Legislature, being 96th volume of Ohio Laws, has been codified by the compilers of Bates' Revised Statutes, having mixed up what applies to villages and what applies to cities indiscriminately, whereas a special study of the code as passed, in which the powers of cities and villages are separately classified, will lead one to see

1906.]

Kraft v. Wolf.

the distinction and the purpose of the Legislature more clearly. As before stated, however, this being a general demurrer, the mayor being without authority to collect fees in ordinance cases until council shall have first prescribed the fees by the passage of an ordinance, the demurrer of the defendant will have to be sustained; otherwise it would have been overruled.

It is due to the mayor to say that in the collection of fees he has been following the custom of his predecessors, supposing that council had fixed the fees he was authorized to tax and collect. It is also due to the mayor and the city officers to say that in fixing the salary of the mayor at the small sum of three hundred dollars, it was supposed that he was entitled, in addition thereto, to the fees of the office.

Demurrer to the petition will be sustained and petition dismissed.

W. W. Riddle, City Solicitor, for plaintiff.

S. H. West, for defendant.

HOMESTEAD AND FAMILY EXEMPTION.

[Common Pleas Court of Cuyahoga County.]

FRANK KRAFT V. HERMAN WOLF.

Decided, January 6, 1905.

Attachment for Necessaries—Homestead Exemption—Special Exemption to One with a Family—Stepchild not a Daughter—What Constitutes a Family.

1. There can be no doubt that the services of a physician constitute "necessaries" under the law.
2. A stepchild who has not been declared by the probate court, under Sections 3137a and 3139, to be to all legal intents and purposes the child if its stepfather is not the child of such stepfather within the meaning of the act providing for exemption in lieu of homestead.
3. A widower, who is living with his own mother, can not be said to be a man of family, and entitled to the special exemption allowed to one with a family, because he contributes something toward

the support of a stepchild, who has never been formally declared to be his own child, and who lives with her maternal grandmother.

BEACOM, J.

The plaintiff obtained in a justice court an attachment against the wages of the defendant for a bill due plaintiff for necessities, to-wit, for professional services as a physician. There is no dispute, of course, but that such services constitute necessities under the law. Judgment was rendered in the justice court in favor of plaintiff and the attachment was sustained, and the case comes here on appeal.

The facts are, substantially, that Wolf claims this property to be exempt. He claims it on two grounds: First, that under Section 5441, Revised Statutes, he is entitled to exemption in lieu of a homestead, he having no homestead; and, second, that he is entitled to the special exemptions allowed to one who has a family, under Section 5430, Revised Statutes.

The facts are not in dispute. It seems, substantially, from the affidavits of both plaintiff and defendant that Wolf is a widower, he having some years ago married a widow who was the mother of a little girl, the little girl being now five years old. The mother of this child died, perhaps some time early last fall, and Wolf, who had been living with his wife and this child at the home of the wife's mother, ceased to remain in that house, went away and is now living with his own mother, having left the little child with its maternal grandmother. He says that he assumed the care, custody and control of said child and agreed to pay the sum of \$2 each week to his mother-in-law, the child's maternal grandmother, for its board and lodging, and that he is to furnish the child with all necessary clothing, and that he has bought a pair of shoes and some dress goods for the child since the wife died. The question is whether or not, under that showing, he is entitled to the exemptions.

Under Section 5441, Revised Statutes, in which he claims he is entitled to \$500 because he has no homestead, he says that he is entitled to it because he is a widower living with an unmarried daughter. That he is a widower there is no dispute, and that this child is unmarried there is no dispute; but is she his daughter?

1905.]

Kraft v. Wolf.

Sections 3137a and 3139, Revised Statutes, throw some light upon whether or not a step-daughter is a child, not by what they say but by what they involve and by what they exclude.

The first named section provides, in substance, that any inhabitant of the state being the husband of any woman who has a child by a former husband may file a petition in the probate court, etc., for a change of name of such step-child.

Section 3139 provides that when this provision has been complied with, when he has made the application and had a change of name, when all these things have been done, the probate court shall declare on its order that from that date such child is, to all legal intents and purposes, the child of the petitioner. The court shall make that declaration after all these things be done. I think a fair construction of that is to say that the Legislature has fairly said that up to that time the child is not the child of the petitioner. There is only one decision in this state on that subject, and that is in 5 Ohio, 315. The fact that it was never modified in any way indicates that it is a settled rule. It was held in that case that a step-father has no right to the services of a step-child. The court is, therefore, of opinion that, although this man is a widower and this child is unmarried, she is not his daughter.

There is a further requirement that he should live with the child, and I may say that I would not wish to be bound in some subsequent case by what I say now on this subject. I can understand how the father of a five-year-old girl might be able to live very little under the same roof with the child and yet come within the spirit of these exemption laws, but it is unnecessary to pass upon the question of whether or not he lives with the child. The court is of opinion that he is not the father under the law.

The next question is, does he come within the provisions of Section 5430 providing for special exemptions to a person who has a family. It is conceded that he would be entitled to hold this property exempt if he comes within this section. The question is, does this man have a family? I think we all know better than we can express just what a "family" means. The fact that he contributes to the support of this child does not

constitute him "a person who has a family." A family is a collection of individuals living by one fireside. The language of the Century Dictionary, which is adopted by the text-books on law, defines a family as "A collective body of persons who form one household." That is what a family is. Here is a man who did have a wife; that wife is dead. She had a child and he is not living with it, perhaps is not near it but is living with his mother as he did in his childhood. I think it is manifest that he is not a person, in the language of the statute, who "has a family." Moreover I may say, although this does not throw much light upon the case, there is a rule in the A. & E. Ency. of Law, Vol. 12, page 872, that generally the term "family" does not include the step-children. For instance, at a man's death the statute says his property should go to his family. Step-children are excluded generally but it depends somewhat upon the subject-matter. Sometimes step-children have been held as part of the family, but it would depend upon the condition that they have constituted in effect one family, living under one roof, as one unit in the community. Then they are one family.

The court is of opinion that this man is not entitled to the exemption in lieu of a homestead under Section 5441, Revised Statutes, because it is clear that this child is not his daughter, and also that he is not entitled to the special exemptions provided by Section 5430, Revised Statutes, because he does not have a family. Attachment sustained.

Carr & Golding, for plaintiff.

Wm. P. Dunlap, for defendant.

1905.]

Railroad Co. v. Railway Co.

OCCUPATION OF STREETS BY STEAM RAILROAD TRACKS.

[Superior Court of Cincinnati, Special Term.]

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY v. THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY.

Decided, February 1, 1904.

Abutting Owner—Rights of with Reference to Occupation of Street by Steam Railroad Track—City Ownership of Railroad—Combination of Lessee Line with Other Lines—Power of Board of Public Service—To Authorize Occupation of Streets—Tracks Unlawfully in the Street a Public Nuisance.

1. Mere delay in the travel suffered by a property owner in common with the general public occasioned by the construction of a steam railroad track in the street, but not on that part of the street opposite his property, there being an outlet from said property along the street without crossing the track, is *damnum absque injuria*. *The Robert Mitchell Furniture Co. v. C., C., C. & St. L. R. R. Co. et al*, 7 N. P., 639.
2. Where a steam railroad track is constructed in a street upon which property abuts, but not in that part of the street opposite the lot lines of the property produced, and it can nevertheless be shown that such track is an interference with the access to said property—whether such facts are sufficient to maintain an action.—*Quære?*
3. Whether the statement in *Robert Mitchell Furniture Co. v. R. R. Co.*, 7 N. P., 639, that Section 3283 relates only to damages not covered by the Constitution.—*Quære?*
4. The operation by a lessee company of the Southern Railroad (owned by the city of Cincinnati in connection with other lines which such lessee company may own or control, is in no sense a combination of the city with such other lines in violation of Article VI, Section 6 of the Constitution of Ohio; and the lessee company, by reason of the fact that its lessor is the city of Cincinnati is in no wise limited as to the character of business it may carry on in the operation of the leased line or in the connections it may make with other roads.
5. The board of public service is not authorized by the act of April 18th, 1878 (75 V. 115, Section 8324; Smith & Benedict, Section 5),

to grant to the lessee company the right to occupy the streets of the city of Cincinnati.

6. A steam railroad unlawfully in the streets is a public nuisance, and may be enjoined by one who is specially damaged thereby.

SMITH, J.

This case comes before me on a motion to dissolve the temporary restraining order heretofore issued.

The plaintiff is the owner of a lot on the southeast corner of Water and Plum streets in the city of Cincinnati, fronting one hundred feet on Water street and about four hundred and fifty feet on Plum, running back southwardly on parallel lines to low water mark on the Ohio river. The defendant is the owner of a lot immediately adjoining the aforesaid lot on the east, fronting sixty-six feet on Water street and running back southwardly in parallel lines about four hundred and fifty feet to low water mark on the Ohio river. The plaintiff is also the owner of the property immediately east of the lot of the defendant, fronting over two hundred feet on Water street and running back southwardly in parallel lines about four hundred and fifty feet to low water mark on the Ohio river, and bounded on the east by Elm street.

The lot owned by the defendant was purchased from the executor of the estate of one Regan, and in the discussion of the motion has been called the Regan lot.

The defendant company is the lessee of the Cincinnati Southern Railway for a term expiring in 1966. By the terms of its lease the Board of Trustees of the Cincinnati Southern Railroad are obliged to furnish certain terminals for the lessee, and in pursuance of this obligation are now condemning the land on the north side of Water street opposite the lots owned by plaintiff and defendant, although the condemnation proceedings are not yet completed.

Water street is a public street of the city of Cincinnati, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company occupies the middle of the street with a single railroad track known as the Cincinnati connection track, over which it operates engines and cars in great numbers to connect with other railroad tracks in the city of Cincinnati.

1905.]

Railroad Co. v. Railway Co.

In the month of February, 1903, defendant obtained from the Board of Public Service of Cincinnati the right to construct, maintain and operate a single track railroad across Water street from said sixty-six foot lot to land opposite and on the north side of Water street now in process of appropriation by the Board of Trustees of the Cincinnati Southern Railway for the use of the defendant as lessee as aforesaid.

The defendant has constructed on its sixty-six foot lot on the south side of Water street a railroad track for the use of its engines and cars, intending in time, after the appropriation proceedings with respect to the property on the north side of Water street have been completed, to extend its tracks to said property by crossing Water street under the grant made to it as aforesaid by the board of public service.

The plaintiff filed its petition in this court alleging that the defendant company, having constructed its track on the Regan lot, as has been stated, "is about to extend said track across the sidewalk in front of the said lot owned by it and out into the street, connecting the same with the said connection track in the centre of said Water street, and in front of and near to the property of the plaintiff above set forth."

Thereupon plaintiff procured from this court an order temporarily restraining the defendant from crossing Water street until the further order of the court.

The defendant has filed its answer admitting that it intends to extend its track across Water street, but denies that it intends to connect said track with the connection track in front of any property of plaintiff; that the only track which it intends or has ever threatened to construct is one that will be wholly within the lines of its said lot sixty-six feet produced northwardly to the north side of Water street, and that it has no intention nor has it ever threatened to place said track in any part of Water street either east or west of said lot lines produced as aforesaid.

In reply plaintiff alleges that the construction of the track across Water street will interfere with its access and business, and alleges as a further ground for relief that the connection as contemplated between the property owned in fee on the south

side of Water street by plaintiff with the property on the north side of said street held by it under lease from the Board of Trustees of the Cincinnati Southern Railway would be a violation of Article VIII, Section 6 of the Constitution of Ohio.

As the lot owned by plaintiff on the west side of the Regan lot is given an outlet along Water street to Plum street and the lot owned by plaintiff on the east of the Regan lot is given an outlet along Water street to Elm street, the construction of the contemplated track by defendant company does not leave any of the property of plaintiff in a *cul de sac*, and we need not inquire what its rights would be in such a case. The mere delay in travel caused by crossing the track in getting to plaintiff's property is one suffered by plaintiff in common with the public, and although it may suffer in a greater degree than the general public, yet its injury is similar in kind to that suffered by the general public, and is therefore *damnum absque injuria*. This principle is now firmly established in this state. *The Robert Mitchell Furniture Co. v. C., C., C. & St. L. R. R. Co. et al*, 7 N. P., 639; affirmed by the Supreme Court, 65 O. S., 571.

As to the injury to the access to plaintiff by the construction of the contemplated track by the defendant across Water street. It does not appear in evidence at what point on the north side of Water street the track which the defendant contemplates constructing will cross. The defendant itself, as I understand it, has not finally determined this point. It merely alleges in its answer that it will be at some point on the north side of Water street within the lot lines of the Regan lot produced.

The defendant urges that it is immaterial where it crosses the north line of Water street so long as it is within the lines of the Regan lot produced, for the reason that an abutting owner has a property interest in that part of the street only which is embraced within his lot lines produced; and therefore whatever interference with an owner's access arises from an obstruction in any other part of the street is not a taking of property in the constitutional sense of that word. I know of no decision in this state upon this precise question; and I

1905.]

Railroad Co. v. Railway Co.

do not care to express an opinion upon it until the necessities of the case require it. Such necessity has not yet arisen for the reason, as I have stated, that it does not yet appear just where the track will cross the north line of Water street; nor is there any evidence offered by plaintiff, if such evidence can be offered, showing in what way the track will interfere with its access if the track comes close to the east line of its west lot produced, or the west line of its east lot produced.

As illustrating the difficulty in declaring a rule as broadly as defendant contends, suppose a lot, say six feet only in width and incapable of access by vehicles without the use of a part of the street opposite adjoining property, would the construction of tracks in the street opposite such adjoining property, which did as a matter of fact injure the access to the six foot lot, nevertheless be not a legal injury to the access?

I suggest the question, not as indicating an expression of opinion either way upon it, but only as showing that the contention of defendants presents difficult questions that are not to be lightly brushed aside by a court. *Herzog v. P., C., C. & St. L. Ry. Co.*, Circuit Court, January 14, 1904, *The Court Index*.

It is also contended by plaintiff, if I have properly understood the contention, that in addition to the interference with the access to its property and the consequent infringement of its property rights, which are protected by the provision in the Constitution of Ohio, that before property can be taken for public use compensation shall first be made in money in accordance with Article I, Section 19, the plaintiff will suffer other damage not covered by the constitutional provision and not suffered in common by the public: as, for instance, damage from noise, smoke, vapor, fire, sparks, etc.; that injuries from these causes are made a violation of the rights of plaintiff by Section 3283 and that plaintiff is entitled to an injunction against the laying of tracks until it has been compensated for these injuries by the defendant.

In the case of *Mitchell v. C., C., C. & St. L. R. R. Co.*, 7 N. P., 639, I said:

"The rule in Ohio has been settled since the decision in *Parrott v. C., H. & D. R. R. Co.*, 10 O. S., 625, 'that a railroad authorized by law and lawfully operated can not be deemed a private nuisance.'

"In the case at bar the tracks of the railroad company are in the street by authority of law and there is no evidence to show that they are not to be lawfully operated. They can not be held therefore to constitute a private nuisance, and the *Pruden* and *Branahan* cases are not in point.

"It is true that since the decision in the *Parrot* case Section 3283 gives a remedy to abutting owners of property or those 'near to' the improvement for consequential injuries suffered by reason of the improvement, but such damages are those which but for the statute could not be recovered and are not therefore intended as a compensation for property taken as the term is used in the Constitution. A person who suffers such damages is therefore not entitled to an injunction to prevent the laying of the tracks, there being no question as to the solvency of the railroad company."

So far as the above statement declares that Section 3283 relates only to those injuries which are not covered by the constitutional provision and excludes those that are, I seriously question whether it is correct. The language of the section seems broad enough to cover injuries from any source. The statement, however, was *obiter*, and may be properly reviewed when the question arises in some future case. I express no opinion upon it at this time.

In the present case I have held that it is not possible to determine at the present time whether there will be any appropriation of the property rights of the plaintiff which are protected by the Constitution.

Whether for injuries not protected by the Constitution but for which both the right to recover and the remedy are created by Section 3283, the party complaining is ever entitled to an injunction, but must always seek his remedy in an action at law for damages is a question upon which it is not necessary in this case to express an opinion. But in a case such as the one at bar, where it is not shown that an action for damages would not furnish an adequate remedy, it seems to me quite clear that the complaining party is not entitled to an injunction.

1905.]

Railroad Co. v. Railway Co.

It has been suggested by plaintiff since the argument of the case that inasmuch as the contemplated track inconveniences him in passing from one lot to the other, which is different from the inconvenience suffered by the public at large, that there is an interference with his access on the authority of *Hatch v. C. & I. R. R.*, 18 O. S., 92. As this question was not argued before me, I prefer not to express any opinion upon it.

It is also urged by plaintiff that inasmuch as the defendant will occupy the land on the north side of Water street as lessee from the Board of Trustees of the Cincinnati Southern Railway, which board represents the city of Cincinnati, the owner of the road, and the lessee company owns the Regan lot on the south side of Water street in fee, that the construction of a connecting track between them and the operation of such track in the business of the defendant is a violation of Article VIII, Section 6 of the Constitution of Ohio, which declares that—

“The General Assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation or association whatever; or to raise money for, or loan its credit to, or in aid of any such company, corporation or association.” *Taylor v. Commissioners*, 23 O. S., 22; *Wyscaver v. Atkinson*, 37 O. S., 80.

The decisions in *Walker v. Cincinnati*, 21 O. S., 14; *Cincinnati v. Taft*, 63 O. S., 141; *Cincinnati v. Ferguson*, 12 O. D., 439; affirmed in 66 O. S., 658, dispose of this contention.

The effect of these decisions is that the city of Cincinnati has lawfully constructed and is the lawful owner and lessor of the Cincinnati Southern Railroad and that it is now too late to question its ownership or the validity of its act as owner.

The operation of the road by a lessee company in connection with other lines which it may own or control is in no sense a combination of the city with such other lines. The city derives no profit and incurs no liability from such connection. It occupies the position of lessor towards the lessee who occupies and operates its road. Its interest in such operation is confined to the rental and other obligations which the lease imposes; and the lessee company for the reason that its lessor

is the city of Cincinnati is in no wise limited as to the character of business it may carry on in the operation of the leased line, or in the connections it may make with other roads.

One of the main purposes to be sought in making the present lease was the connection of the road with other lines of railway, thus bringing the city into a wider and more intimate connection with other parts of the country.

The defendant asserts the right to cross Water street with its tracks, and to operate its cars thereon by virtue of a resolution passed by the Board of Public Service of Cincinnati, which is the successor of the Board of Public Works of the same city; the act of April 18, 1878 (75 V., 115), Section 8324 (Smith & Benedict), Section 5 declaring that—

“The trustees of said railway shall not use or occupy any street, alley or other public way, space or ground or any part thereof belonging to said city unless they make application in writing and receive the consent thereto of the board of public works of said city; provided that they shall have the right to use the streets and public grounds now occupied by said railway.”

The application to cross Water street was not made by the Trustees of the Southern Railroad, and the grant to occupy it was not made to them, but to the defendant company. As the act of April 18, 1878, *supra*, applies only to the Trustees of the Southern Railroad, it necessarily follows that the grant to the defendant company can not be sustained by that act; and as no other provision of the statute has been pointed out which confers upon the board of public service the right to grant to steam railroads the right to occupy the streets, the grant to the defendant company necessarily is invalid.

It is urged, however, by the defendant that if the defendant is unlawfully in the street, it creates thereby a public nuisance, and the only remedy is by indictment or an action by the city to enjoin it.

But the law is well settled that “a public nuisance may be enjoined by one who is specially damaged thereby” (Elliott on Railroads, 1650; *Branahan v. Hotel Co.*, 39 O. S., 333); and it is quite clear to me that a property owner who is in close prox-

1905.]

Short v. City of Cincinnati et al.

imity to a railroad unlawfully operating in a street suffers a damage different in kind and not merely different in degree from that suffered by the community at large, and therefore suffers, within the meaning of the rule, a special damage and is entitled to injunctive relief to prevent the same.

The motion to dissolve the temporary restraining order heretofore issued will be overruled with leave to the defendant to renew its application for a dissolution of the same when it has secured a grant from the proper authorities of the city to cross Water street and when it has determined the points at which it intends to make such crossing.

Ellis G. Kinkead and Challen B. Ellis, for plaintiff.

Edward Colston, for defendant.

VERIFICATION OF PETITION AND SUMMONS UNDER THE BRANNOCK LAW.

[Probate Court of Hamilton County.]

CHARLES W. SHORT v. THE CITY OF CINCINNATI AND JULIUS
FLEISCHMANN, AS MAYOR OF CINCINNATI, HAMILTON
COUNTY, OHIO.

Decided, May, 1905.

Liquor Laws—Contest of Election—Under Brannock Law—Verification of Petition—Summons—Appearance.

1. It is not necessary that a petition for the contest of an election under the Brannock Law should be signed by the petitioner; and the requirement as to verification is complied with, where the petition is sworn to by the petitioner before an officer duly authorized to administer the oath.
2. But where no summons is issued within twenty days after the election, directed to the mayor of the corporation, notifying him of the filing of the petition, there is a failure to comply with the statute, and no action is begun, and the petition, together with motions to dismiss the same, filed by duly qualified electors of the district, should be stricken from the files.

MALSBARY, J.

On November 10, 1904, an election was held, under the Brannock Law, in a certain residence district in the city of Cincinnati.

nati, the boundary lines of which are set forth in the petition filed in this case.

The portion of the Brannock Law that affects the case at bar is as follows:

"SECTION 11. Any person being a qualified elector of any residence district of any municipal corporation wherein an election shall have been held as provided for in this act may contest the validity of such election by filing a petition duly verified with the probate court of the county in which such residence district is situated, within ten days after the election setting forth the grounds for contest. The probate judge, upon the filing of such petition, shall forthwith issue a summons addressed to the mayor of such municipal corporation notifying him of the filing of such petition and directing him to appear in said court on behalf of said residence district at a time named in the summons, which time shall not be more than twenty days after the election nor less than five days after the filing of such petition. The probate judge shall have final jurisdiction to hear and determine the merits of the proceedings, and in other respects in the procedure of the hearing he shall be governed by the law providing for the contesting of an election of a justice of the peace so far as such law is applicable. The probate court shall require the person or persons contesting the election to furnish security for costs before said petition is filed. Any qualified elector of such residence district may appear in person or by attorney, in such contested election case in defense of the validity of the election."

The petition in this case was filed in this court at a time when the judge was absent from the court house, on Saturday, the 19th day of November, 1904, under the following circumstances:

Charles W. Short, who is not an attorney, appeared at the probate court a short time before the closing hour on said day, and asked the deputy in charge to swear him to the petition filed in this case. The deputy said to him that, in his opinion, he should sign a written oath at the bottom of the petition before filing the same. He insisted, however, on swearing to the facts set forth in the petition without subscribing his name to a written oath. The deputy, therefore, administered the oath, in accordance with his request, and then immediately marked the petition filed, and afterwards certified the fact that the petition was sworn to in regular form, at the bottom of the petition.

1906.]

Short v. City of Cincinnati et al.

The name of Charles W. Short, however, appears in the petition, at the beginning, in the following words:

"Now comes Charles W. Short, and says that he is a qualified elector in the following residence district, to-wit:"

Then follows a description of the territory, and the other facts set forth in the petition, which are not necessary to be set out here.

This was the first case of the kind filed in this court. No precepe was filed for summons by Charles W. Short, or any one else.

When afterward an attorney for the plaintiff appeared in the case and called the attention of the court to that portion of Section 11 above set out, relating to the issuance and service of summons, more than ten days had elapsed after the filing of said petition, and more than twenty days had elapsed after said election was held. It was agreed by all counsel in the case, at the hearing of this matter, that Charles W. Short, not being a lawyer, and the deputy who swore him to the petition not knowing of the statute in this case, and not having his attention called to the same, and the court personally knowing nothing of the facts, being absent at the time, were all excusable, because no summons was issued. No summons, therefore, was issued, and no service ever made upon the mayor, in accordance with said statute.

On November 30, 1904, one Andrew Schrimper, a qualified elector of said district, filed a motion, through his attorney, to strike said petition from the files, assigning in said motion his reasons, in the following words, "not intending in any manner to enter his appearance in this action, but for the sole purpose of protesting and objecting to the petition filed herein, for the reason that it is not duly verified according to law, and to set aside service of process, because it was not made according to law."

Also, on November 30, 1904, one John Barron, a qualified elector of said district, filed a motion, through his attorney, to strike said petition from the files, assigning in said motion his reasons, in the following words, "not intending in any manner to enter his appearance in this action, but for the sole purpose of protesting and objecting to the petition filed herein and the

summons issued herein, for the reason that it was not duly verified according to law, when filed in said probate court, and because no summons has been issued in accordance with law."

The questions raised in this case are:

First. Was the petition duly verified?

Second. Did Andrew Schrimper and John Barron, or either of them, by filing said motions, enter their appearance in this case as defendants, so that the case is now at issue and ready to be tried on its merits?

As to the first question, it is necessary to refer to the wording of the statute, to determine whether the petition was "duly verified" in accordance with the statute above quoted.

At the time the petition was filed, the plaintiff, Charles W. Short, made oath before a deputy clerk of the probate court that the facts stated in the petition were true, as he verily believed. Under Section 533, of the Revised Statutes, authority is given a probate court deputy to administer oaths. It is true that the deputy wrote out and signed, at the bottom of the petition, a certificate setting forth the facts relative to the administering of said oath as they had actually occurred, several days after the petition was filed; but the oath itself was administered, as above stated, before the petition was filed. Was this, then, under this statute, a proper verification? Section 5107 not only requires that the pleading should be *verified*, but that the verification should be *signed* by the party who makes it. The section of the Brannock Law requiring the pleading to be "duly verified" does not require that the petitioner shall sign the verification. This, being a special statute, should be strictly followed. The petition, it seems to me, was "duly verified," because the facts in it were sworn to before the deputy. As the statute does not require that the oath should be signed by the petitioner, it is, therefore, not necessary. The fact is, an oath was administered by an officer duly authorized to administer it, which, it seems to me, complies with this statute requiring the petition to be "duly verified." A case which seems to me to be clearly in point, as to this question, is *The Gambrinus Stock Co. v. Weber*, 41 O. S., 689.

To determine the second question, it is also necessary to refer to the wording of the statute above quoted. The requisites laid down in the statute are as follows:

1905.]

Short v. City of Cincinnati et al.

First. A qualified elector may file a petition, duly verified, within ten days after the election, setting forth the grounds for contest.

Second. The probate judge, upon the filing of such petition, shall forthwith issue a summons, addressed to the mayor of the corporation, notifying him of the filing of the petition, etc., within a time not more than twenty days after the election, nor less than five days after the filing of such petition.

I have already said that the petition was properly verified when filed. It was filed with the probate court within ten days after the election. For the reasons, however, explained above, no summons was ever issued on said petition and served on the mayor of the city of Cincinnati. In an election contest, as I understand the law, the statute must be strictly followed and strictly construed. As there is no law governing this matter, except the law above quoted, I am of opinion that as no summons issued upon the petition within the time limited by the statute, and which should have then been served on the mayor, that the statute has, therefore, not been complied with. It is surely the intent of the law that the mayor shall at least have the opportunity to come in and defend the rights of the city of Cincinnati, in a proceeding of this kind. This he did not have. It seems to me that this is a preliminary and necessary requisite to a hearing of the case on its merits.

I conclude, therefore, that no action was begun in this matter—no proper case filed in this court in accordance with the statute. If no action was begun, then there was nothing to which an appearance of any person could be entered, for the statute says that—

“Any qualified elector of such residence district may appear in person, or by attorney, in such contested election case, in defense of the validity of the election.”

There being no case filed, there could be no entry of appearance. The only entry of appearance authorized by this statute is, that after a case is filed, in order to defend the validity of the election, any qualified elector of such residence district may appear in person or by attorney, etc.

This is the only right granted by statute to such elector. It

B. of E. v. Bowland, Treasurer, et al. [Vol. III, N. S.]

follows, therefore, that not only the petition, but also both of said motions should be dismissed.

The only decision that I find bearing on this particular section is one by Judge Geiger, in the case of a petition filed in the Clark County Probate Court, under the Brannock Law (2 N. P.—N. S., 389). I have applied the principles laid down by Judge Geiger, in the case above cited, as far as I think them applicable to the last question in the case at bar, and believe them sound in reason.

The petition and both of said motions will, therefore, be dismissed.

Wayne B. Wheeler and B. T. Doty, for plaintiff.

Fred L. Hoffman, for Schrimper and Baron.

STREET ASSESSMENTS AGAINST SCHOOL PROPERTY.

[Common Pleas Court of Franklin County.]

THE BOARD OF EDUCATION OF THE CITY OF COLUMBUS v. W. G.
BOWLAND, TREASURER, ET AL.

Decided, January 4, 1905.

*Street—Assessment for Improvement of—Against School Property—
Uncertain Effect of Division of Funds—Under New School Code—
Petition of School Board for Improvement—Lien of Assessment on
Property Sold to School Board.*

1. The separation of school funds under the new school code, making it possible to distinguish the trust from the contingent fund, will not have the effect of rendering valid an assessment against school property for a street improvement, where the levy was made prior to the passage of the school code, whatever may be its effect as to such levies made subsequent thereto.
2. School property is not rendered liable to assessment for a street improvement by reason of the fact that with knowledge that the property was not liable to assessment the school board petitioned for the improvement.
3. But where the lien of an assessment for a street improvement has already attached, it will not be defeated by the subsequent purchase of the property by a school board.

BIGGER, J.

This action was brought by the plaintiff to restrain the defendants, Bowland, the treasurer of the city, and the city from

1905.]

B. of E. v. Bowland, Treasurer, et al.

collecting certain assessments levied by ordinance of the city council against the property of the plaintiff.

There are four separate causes of action.

The first cause of action states the action of the city council in levying an assessment for street improvements against a large number of pieces of real estate belonging to the plaintiff, and then alleges that these so-called liens are not valid liens against the plaintiff's property because no valid assessment can be levied against property held for educational purposes.

The second cause of action, like the first, states the action of the city council in levying an assessment upon a number of pieces of property belonging to plaintiff, and in addition states that the plaintiff had petitioned for the improvement.

The third, like the first two, states the levy of an assessment against certain pieces of property now belonging to the plaintiff but that the plaintiff acquired the property after the passage of the assessment ordinance.

The fourth cause of action is based upon the levy of certain assessments upon plaintiff's property for cleaning and sprinkling the streets in front of the plaintiff's property.

The question presented is as to the validity of these assessments. The Supreme Court in the case of *The City of Toledo v. The Board of Education*, 48 Ohio State, 83, decided that school property is not liable to assessment for a street improvement, nor can a judgment be rendered against a board of education for the payment of assessments out of the contingent fund.

It is claimed that since the passage of the new school code which separates the fund provided for school purposes into separate funds that this is no longer applicable. That prior to the passage of that act all the revenue of the board of education being placed in the one fund and a part of that fund being composed of trust funds applicable only to the payment of superintendent and teachers that this prevented any portion of the fund from being applied to the payment of assessments. But as the trust fund is now by law separated from the contingent fund that there is no longer any difficulty in holding a board of education which is empowered to acquire, hold, possess and dispose of real property liable for an assessment for street improvements.

Whatever may have been the reason of the Supreme Court for the decision, which is not disclosed in the opinion, it is settled that prior to the passage of the new school code at least a valid assessment for street improvements could not be levied against school property. If the separation of the fund into separate funds so that the trust fund can now be distinguished from the other funds of the board will have the effect of rendering assessments hereinafter levied against school property valid, I am clear that it can not have that effect as to those assessments which were levied prior to the passage of the new school code. Statutes are not to be given a retrospective operation unless the legislative intention that they shall so operate is clearly expressed.

In the case of *Kelly v. Kelso and Loomis*, 5 Ohio State, 190, the Supreme Court decided that—

“Statutes affecting substantial interests and rights of property have a prospective operation only unless the contrary intention is clearly expressed.”

To the same effect is the decision of the Supreme Court in the case of *Bemier v. Becker*, 37 Ohio St., 72. Acts which were invalid when done are not valid by subsequent legislation in any case, unless its terms show clearly that that was the legislative intention. This disposes of the first, second and fourth causes of action.

In my opinion the fact of the petitioning for the improvement by the board would not render the property liable for the assessment. All parties acted with a knowledge of the law, and that such assessment could not be legally levied against school property.

As to the third cause of action which states that the property therein described had been acquired by the board of education subsequent to the passage of the assessment ordinance, I am unable to see any distinction between this case and the case decided by the Supreme Court and reported in the 39 Weekly Law Bulletin, at page 76. In that case the Supreme Court it seems decided that Section 3973, Revised Statutes, which exempts the real and personal property of boards of education from sale by execution, does not apply to a sale on

1905.]

Dow v. Dow et al.

foreclosure of a mortgage, being a subsisting lien on the real estate at the time it was purchased by the board.

I see no distinction in principle between that and a valid lien levied upon property for a street assessment prior to the time when the board obtains the property, being a subsisting lien when the property is purchased by the board of education. While the reasoning of the court is not given, it being an unreported case, I presume the court held the statute could not be applied and could not have application to the enforcement of liens which were valid when created, as to do so would be to defeat the rights of lienholders. This principle seems to be as applicable to a lien for an assessment as to that of a mortgage. For that reason I think the plaintiff is not entitled to the relief asked in the third cause of action. But as to the other three causes of action I think it is entitled to the relief prayed for. For these reasons the demurrer to the first, second and fourth causes are overruled, and sustained as to the third.

J. M. Butler, for plaintiff.

D. T. Keating, for defendant.

EFFECT OF ADVANCEMENTS UPON INTEREST OF HEIRS IN REAL ESTATE.

[Common Pleas Court of Franklin County.]

EDWARD W. DOW v. ROSA DOW ET AL.

Decided, January 24, 1905.

Advancements—Nature of—Not a Loan or Debt—And Create no Liability—Except on Distribution—Quit-Claim of Interest of Heir in Real Estate—Carries Rights Growing Out of Unequal Advancements.

A quit-claim deed, covering all the interest of an heir in the real estate of his ancestor, transfers to the grantee not only the undivided interest of the heir in the real estate, but also such additional interest as he may have by reason of advancements made to other heirs.

DILLON, J.

The father of the parties in this case, now deceased, in his lifetime made certain advancements to the plaintiff herein,

partly in real estate and partly in personalty, by reason of which upon his death in 1895 after the exhaustion of the personal property to equalize the advancements as far as possible, the plaintiff had, by reason of his advancements, received out of the estate \$707.25 more than his sister Ida. There still remained to be divided among the heirs some forty-eight lots situated in the city of Columbus, Ohio.

The present action is in partition, brought by the plaintiff, and the fact is shown that prior to his bringing this action, he purchased for a valuable consideration the interest of his sister Ida, a quit-claim deed being executed by her in which she conveyed to the plaintiff all her interest in and to said lots. The interest which the said Ida possessed in said lots as an heir, exclusive of any considerations by reason of advancement, was an undivided one-ninth. It is now claimed by the plaintiff that he acquired by virtue of said purchase and deed not only the undivided one-ninth interest of said Ida in said real estate, but also all other claim and interest which she had in said real estate in addition thereto, which would accrue to her by reason of her legal claim for such additional interest in said real estate as would equalize her with the said plaintiff.

It is settled in common law as well as by statute (4171) that if the advancement to a child be made in real estate, the value shall be considered and taken as a part of the real estate to be divided, and if in money or other personal estate, it shall be taken and considered as a part of the personal estate to be distributed; and it is further well settled that if the personal estate for distribution to the heirs is insufficient to equalize the other heirs, then the same shall be done by an increased portion of the realty.

So far as a precedent is concerned, counsel have been unable to aid the court except in so far as we have the incidental comment of the deciding judge advertng to the subject in the case of *Fels v. Fels*, 1 C. C., 420-426. This case must be decided upon a consideration of the theory and nature of advancement and of the rights and remedies of parties to advancement. An advancement, being a free, irrevocable transfer of property by a parent in his lifetime to a child, in anticipation of the share

1905.]

Dow v. Dow et al.

of the estate which the donee would receive in the event of the donor's dying intestate, it has become well settled that such an advancement is not a loan. Nor is it a debt to be repaid. Such an advancement is no part of the estate upon which an administrator can collect or charge commissions, and can only be considered on distribution. Neither does it create an indebtedness from the child so receiving to his co-heirs, and if it should subsequently come to pass that the estate was not sufficient to give each of the other heirs an equal share, it does not give either of these heirs a right of action to recover the difference from the favored heir. Indeed the only liability of such donee by way of advancement is his liability of receiving a correspondingly less portion of the estate. It follows that by reason of the nature of the advancement, that the other heirs' interest in the deceased's estate becomes increased by that much. The donee in advancement can not by transfer or deed convey away his full heirship interest in the estate, and in case he should so attempt the grantee in his deed would take the title subject to all advancement to his grantor and would receive only that interest which would remain after the other heirs had been equalized with the grantor (*Steele v. Frierson*, 85 Tenn., 430).

Likewise if a creditor of the plaintiff in this case had levied upon or attached his interest, it has been decided that his actual interest as an heir would not be thus seized, but only the interest which he would possess after the other heirs had been equalized (*Ligier v. Field*, 78 Wis., 367).

The law, therefore, has recognized the interest such as the plaintiff possessed in this case, as a definite, fixed interest, subject to transfer or to levy, execution and sale. The fact that the exact interest has not yet been determined does not suffice to lessen its character as a transferable interest. On the other hand, what was the nature of the interest of the sister Ida in this case? Was it merely an undivided one-ninth interest and then a separate right or claim to assert, maintain and have subsequently determined an additional interest, or didn't her interest in said real estate consist not only of the one-ninth, to which she was entitled as an heir, but also by virtue of law

such a definite, increased interest in the real estate existing from the time of the ancestor's death, as might be transferred by her by deed? The law casting this extra interest in and to said real estate upon her was just as certain as the law of descents itself. And, therefore, while one law upon the death of the ancestor cast upon her a title to the undivided one-ninth interest, another principle of law at the same time and in just as good and certain right cast upon her an additional interest. Recognizing, therefore, that no error in judgment, or mistake as to law, if such may have existed, can not be pleaded and that this case must be decided upon the effect of the quit-claim deed, I have concluded that the deed of Ida to her said brother conveying all her interest in said real estate, transferred to him not only her undivided one-ninth interest, but such additional interest as she had by reason of the advancement to plaintiff.

Decree of partition and judgment accordingly. Appeal bond \$100.

M. E. Thrailkill, for plaintiff.

Kinkead, Merwine & Schumacher, for defendants.

1905.] Newburgh Brannock Law Election Contest.

INSUFFICIENT DESCRIPTION OF A "RESIDENCE DISTRICT."

[Probate Court of Cuyahoga County.]

IN RE PETITION OF FRANK WIGHTMAN, CONTESTING ELECTION IN
THE CITY OF NEWBURGH UNDER THE BRANNOCK LAW.

Decided, November 26, 1904.

Liquor Laws—Petition Jurisdictional—Under Either the Brannock or the Beal Law—Petition for an Election in a City—Not Descriptive of a "Residence District"—And not Sufficient Under Brannock Law—Procedure for Contest of Election.

1. Under the Brannock Law a judge of the probate court is clothed with final jurisdiction in a proceeding to contest an election, without the intervention of freeholders as provided by the law for the contest of an election of a justice of the peace.
2. A petition for an election to determine whether the sale of intoxicating liquors as a beverage shall be sold within certain prescribed territory is fundamental and jurisdictional, and must substantially comply with the requirements of the law under which the election is to be held.
3. A petition addressed to the mayor (in accordance with a provision of the Brannock and not of the Beal Law), wherein more than forty per cent. of the qualified voters of the city of N "hereby request you to order an election to determine whether the sale of intoxicating liquor as a beverage shall be prohibited in said city," is fatally defective in that it does not describe any residence district in the city of N nor describe the entire city as being a residence district or residence corporation.

WHITE, J.

On the 22d day of August, 1904, Frank Wightman, a qualified elector of the city of Newburgh, Cuyahoga county, Ohio, filed in this court his petition contesting the election held on the 13th day of August, 1904, in the city of Newburgh, under the act of the General Assembly, "further to provide against the evils resulting from the traffic in intoxicating liquors" (97 Ohio Laws, page 87), commonly called the "Brannock Law." On the petition a summons was issued, under the law, and served upon Fred Axel, mayor of the city of Newburgh, who inter-

posed an answer to the petition on the 16th of September, 1904.

The question of procedure under the so-called Brannock Law in the probate court on the contest of an election, was raised by preliminary informal motions, and it had been decided by the court in this case that the law casts upon the probate judge final jurisdiction to hear and determine the merits of the proceeding, without the intervention of aid of "freeholders," as provided by the law for the contest of an election of a justice of the peace, and that the procedure prescribing the duty to call three freeholders, by favor of Section 573, of the Revised Statutes of Ohio, as for the contest of an election of a justice of the peace, is not applicable to, and is inconsistent with, the exclusive jurisdiction devolving upon the probate judge on the petition to contest an election under the law.

The issue raised by the petition and answer, and now to be disposed of on its merits, is very simple, and yet while involving a single question, is not easy of satisfactory solution. The facts may be very briefly summarized.

The city of Newburgh is a municipal corporation, organized under the statutes of Ohio, having a mayor and council, and other corporate officers, constituting it a municipality. The territory of the city of Newburgh is bounded by somewhat irregular lines, and is erected out of part of the original township of Newburgh, and part of the township of Warrensville, and is contiguous, in part, to the boundary line of the city of Cleveland.

On the 20th day of July, 1904, there was filed with Fred Axel, who was then and is now duly elected and qualified mayor of the city of Newburgh, a petition which, omitting the signatures, is in the words following:

"A PETITION TO DETERMINE WHETHER THE SALE OF INTOXICATING LIQUORS AS A BEVERAGE SHALL BE PROHIBITED IN THE CITY OF NEWBURGH, CUYAHOGA COUNTY, OHIO.

"*To the Mayor of the City of Newburgh:* We, the undersigned, respectfully represent that we are qualified electors of the city of Newburgh, county of Cuyahoga, and state of Ohio, and that we hereby request you to order an election to determine

1906.]

Newburgh Brannock Law Election Contest.

whether the sale of intoxicating liquors as a beverage shall be prohibited in said city. Dated July 20, 1904."

It is admitted by the pleadings that this petition was signed by at least forty per cent. of the qualified electors of the city of Newburgh. Construing this petition to invoke the exercise of his function as mayor, under the act of the General Assembly (97 Ohio Laws, 87), and commonly called the "Brannock Law," the mayor of the city of Newburgh, on the 25th day of July, 1904, made an order upon the board of deputy state supervisors of the county of Cuyahoga for an election, the order being in the following words:

"This is to certify that a petition was presented to me on the 20th day of July, A. D. 1904, asking that an election be held under the provisions of the act entitled, 'An act to further provide against the evils resulting from the traffic in intoxicating liquors, by providing for local option in residence districts of municipal corporations,' passed by the General Assembly April 18th, and approved by the governor April 19th, 1904; that I have examined said petition and find that it contains the signatures of forty per cent. of the number of votes cast *in said residence district described in said petition*, at the last preceding general election, and I do hereby order that an election be held in said city of Newburgh, county of Cuyahoga, Ohio, in the following residence district, to-wit:

"All of the territory lying within the city limits of the city of Newburgh, county of Cuyahoga, Ohio; that said election be held at the usual voting places in said city, on the 13th day of August, 1904, between the hours of 5:30 A. M. and 5:30 P. M., Central Standard time, of said day. I hereby notify you to take charge, and supervise said election, as required by law.

"FRED AXEL,
"Mayor of said city."

And thereafter the mayor issued his proclamation for the holding of the election on the 13th day of August, 1904. Pursuant to the terms of this proclamation, and upon the petition and order as above set forth, an election was held on the 13th day of August, 1904, the same being conducted under the supervision of said board of deputy state supervisors, and otherwise in pursuance of the general provisions of the statutes of Ohio, providing the mode of conducting elections.

In the answer filed to this petition, the mayor alleges in substance, "that he was and is the mayor, and a qualified elector of the city of Newburgh; that the district described in the petition for said election was and is now a clearly defined, contiguous, compact section and territory, bounded by corporation lines, and contained and contains more than three hundred qualified electors, and less than two thousand qualified electors, to-wit: seven hundred and eight electors." Then proceeding to state that the city of Newburgh, or the territory bounded by the corporate lines of the city of Newburgh, constitutes it a residence district, as defined in Section 4 of the act commonly known as the Brannock Law, setting forth the description in the language of this section of the act containing the definition.

The sole and only question therefore presented, is raised upon the statement and allegations of the petition and answer, and, simply stated, is this:

Was the election, held in the city of Newburg on the 13th day of August, 1904, to determine whether the sale of intoxicating liquors as a beverage should be allowed or prohibited in said city, a legal valid election, it being held by favor, and under the provisions of the so-called Brannock Law, instead of under the act of the General Assembly further to provide against the evils resulting from the traffic in intoxicating liquors in municipalities in the state of Ohio, commonly known as the "Beal Law" (95 O. L., 287).

The contestor contends: 1st. That the petition by the citizens which constitutes, under the law, the jurisdictional act to invoke the election, was not framed or presented under the Brannock Law. 2d. It was not presented to the council of the city of Newburgh, as required by the provisions of the Beal Law, but was presented to the mayor, and by him mistakenly treated as a petition under the Brannock Law.

It is contended by counsel for the mayor that the election was regular and valid by reason of the fact that the entire city of Newburgh constitutes a "residence district" clearly within the terms and provisions of Section 4 of the Brannock Law, which provides that the phrase "residence district" as used in this act, shall be construed to mean any clearly described,

1905.]

Newburgh Brannock Law Election Contest.

contiguous, compact section or territory in a municipal corporation, bounded by streets, *corporation*, or other well recognized lines of boundaries, containing the required number of qualified electors, and otherwise comporting with the limitations and conditions embraced in such statutory definition; and the fact that such "residence district" may be bounded by corporation lines clearly indicates the legislative intent, not to limit the operation of this law to a "residence district" *in*, or *within*, a municipal corporation.

It will not be out of place for the court to take judicial notice of the fact that the territory now embraced in the city of Newburgh was recently a part of the remnants of the township of Newburgh, lying immediately east and south of the present boundary line of the city of Cleveland, and being an irregular shaped territory running for a considerable distance along the southerly line of the city of Cleveland. Until recently much of this territory was rural in its character, but it has been rapidly built up, and is now a prosperous neighborhood.

The only other point that is urged, is the point that the act itself is in conflict with the Constitution of the state of Ohio for several reasons, the strongest position urged as to the fatal defect and unconstitutionality of the law being that the "residence district" which is sought to be defined is made uncertain and ambiguous, and can not be so construed as to give it a uniform operation. The question of the constitutional and legal validity of the Brannock Law in question has been considered in several of the courts of the state, and notably in the case of *Jeffrey, Mayor, v. Ohio, ex rel*, 4 C. C.—N. S., 494,* in which decisions the act has been upheld as not in conflict with the Constitution. The obscure, involved, and ambiguous phraseology of the act, and its inconsistencies, are but the inevitable result of the conflicting, if not corrupting, influences and the legislative agitation which surrounded its enactment. In the light of the judicial discussion which has already been indulged, touching this law, it would seem inappropriate, if not presumptuous, for a court of inferior jurisdiction to find the law to be absolutely invalid, and the point raised by the contestee

* Affirmed by the Supreme Court without report, May 2, 1905.

on this subject having already been ruled in favor of the law, no further comment need be made on this proposition.

The proper disposition of the issue presented will require a cursory glance at the more recent history of legislation in the state of Ohio, dealing with the evils, or presumed evils, resulting from the traffic in intoxicating liquors. The legislative policy of local option on the liquor subject was inaugurated by an act passed on the 3d of March, 1888 (85 Ohio Laws, page 55), entitled, "An act to provide against the evils resulting from the traffic in intoxicating liquors, by local option in any township in the state of Ohio." On April 3d, 1902, the General Assembly passed amendments and supplemental sections to the statutes already existing (95 Ohio Laws, 87), providing the statute familiarly known as the "Beal Law." This law, together with the amended sections of the tax upon the traffic, known as the "Dow Law," is intended to provide for local option in municipal corporations generally. Then, on the 19th of April, 1904, the act was passed and approved, commonly known as the "Brannock Law," which is brought in question in the case at bar. These two enactments providing for local option by and in municipal corporations, are of a penal nature, and must receive strict construction, so far as concerns their penal operation, under the well known rules of statutory interpretation.

It is plain to ordinary observation that local option has been a progressive and growing policy in this state, first applying it to the unit of our political organization in the state, the township; then to the municipal corporation as a whole; and then to parts of the municipal corporation, called "residence districts"; finally giving to urban population the right and power to deal with the traffic in the immediate vicinity of residences and homes.

The paramount purpose and intent of both the Beal Law and the Brannock Law is to afford an expression of popular sentiment on the subject of the liquor traffic. Thus the same end is sought to be achieved by both laws. The mode of procedure under these two statutes is not exactly the same. The general purpose is to elicit an expression of the public will, through the referendum or elective franchise.

1905.]

Newburgh Brannock Law Election Contest.

Both the penalties and the procedure, under the statutes, are slightly different. In the penal provision, under the Brannock Law, the place where intoxicating liquors are sold, after the second offense, is declared a nuisance, and may be abated, or the offender required to give bond, conditioned as the statute prescribes. No imprisonment is provided for. Whereas under the Beal Law no nuisance can be declared, and the law inflicts a penalty which may include imprisonment.

In regard to the procedure, the variance is more marked. Different authorities are to be invoked to order the election. The rules in regard to construing the petition are different. The proceedings in respect to contesting the election, and as to the parties who may appear to defend in such contest, are divergent. It may be said that these are very slight divergencies, and manifests the legislative intent that either statute may be resorted to indiscriminately by either entire residence municipalities, or residence districts of municipalities containing business sections, and that it is optional with the people, these conditions justifying the use of one or the other law, whichever they shall select.

There is another very important consideration which must enter into the disposition of this case. *In order to set aside the election, the court must be satisfied by a fair and impartial application of the law to the admitted facts that the election be held on the 13th day of August, 1904, in the city of Newburgh, was absolutely illegal and void.* It must be admitted that there is no contention here that there was any deception, fraud, or indirection practiced by the mayor or other officers; that there was no elector prevented from casting his ballot, by reason of the error complained of; and that the contest at the polls was fairly and regularly fought out. The result of the election must be taken as the fair and open expression of public will and opinion upon the subject of the liquor traffic in that municipality. Admitting, as we must, that no prejudice, default, or injury is shown by the contestor, and admitting that the election itself, on that day, was conducted regularly and legally, what good reason is shown why such election should not be upheld?

The exercise of the right to hold the election was sought under the Brannock Law, and under no other statute of the state. On this proposition there can be no doubt. If this law, the last upon the statute books upon the subject, permits, in a proper case, of an election in an entire municipality, the case must be decided in favor of the election. This is the vital point in this controversy.

It is insisted that in making the liquor traffic subject to the elective franchise in "residence districts," the Legislature has passed an act which may apply to entire municipalities. That in a proper case it has superseded and repealed the earlier law known as the Beal Law, which by its terms applies to entire municipalities. This is the logical outcome of the position of the contestee. Now to properly invoke the exercise of power under these acts, the initial step is fundamental and jurisdictional. Under the Beal Law, the petition of the electors is addressed to the city council. Under the Brannock Law, the petition is addressed to the mayor or judge of the court of common pleas of the county. Thus, in one case, the authority to order the election is legislative, and in the other case, either ministerial or judicial. In the case of the earlier law, in which the entire municipality is presumed to be interested, the legislative body which is granted power to enact ordinances and police regulations is the tribunal to be invoked. Under the Brannock Law, under which the petition describing the residence district and the proper percentage of electors are controlling conditions, it must be submitted either to the mayor, or to a judge of the court of common pleas. The purpose of this distinction must appear manifest upon even a slight consideration. The election in the entire municipality is brought under the control of a representative, legislative body. The more exacting legal requirements of the initial step, under the Brannock Law, are confided to the scrutiny of either the chief officer of the municipality, whose functions are partly executive and sometimes judicial, or to the scrutiny of a judge, who is presumed to be able to impartially and critically scrutinize the situation, and determine the legal quality of the petition. To order the election, then, is a judicial act, and lies at the foundation of the whole subsequent proceeding.

1905.]

Newburgh Brannock Law Election Contest.

This case has been ably argued by learned and industrious counsel on both sides. It appears to the court that there is much force in the contention of the contestor in the proposition that if the Brannock Law can, in any case, be applied to an entire municipality, the Legislature has placed upon the statute books two laws upon the same general subject, which are manifestly in conflict. The rule, then, if the attempt, by construction, to render the operation of both consistent and harmonious fails, is that the latter statute must repeal the former. The cases cited by counsel clearly sustain this proposition (98 Mass., 480; 11 Wallace [U. S.], 92; 98 Ind., 332). It is clearly held in the state of Ohio that a repeal of the former statute, by implication or by judicial interpretation, is abhorred by the courts, or at least not favored (2 O. S., 210). A recent decision to which counsel call the attention of the court is, *The City of Cincinnati v. Connor*, 55 O. S., page 82. The court, on page 88, say:

"The proposition advanced by counsel for the plaintiff in error, as stated in the brief, is that: 'where two sections of the Revised Statutes apply to the same subject-matter, one or both should be so limited as to give force and effect to both.' * * *

"The proposition may be accepted as sound, without admitting the consequences supposed to flow from it. We recognize it to be a well settled rule of statutory interpretation that: 'Where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention shall be considered an exception to the general one,' and hence, 'if there are two acts, or two provisions in the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also; and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision.' "

Again on page 89, the court say:

"It is an equally well established rule, that the provisions of a statute are to be construed in connection with all laws *in pari materia*, and especially with reference to the system of legislation of which they form a part, and so that all the provisions

may, if possible, have operation according to their plain import. It is to be presumed that a code of statutes relating to one subject, was governed by one spirit and policy, and intended to be consistent and harmonious in its several parts. And where, in a code or system of laws relating to a particular subject, a general policy is plainly declared, special provisions should, when possible, be given a construction which will bring them in harmony with that policy. And it is only when, after applying these rules in the endeavor to harmonize the general and particular provisions of a statute, the repugnancy of the latter to the former is clearly manifest, that the intention of the Legislature as declared in the general language of the statute is superseded."

In the spirit of this judicial rule, what is the relation of these two distinct acts upon the same subject? It is virtually claimed by the contestee that the Brannock Law is a mere amendment to the Beal Law, and that they are not distinct legislative enactments, so far as their practical operation is concerned, and whenever the facts warrant it, either act may be applied to the proper situation indiscriminately.

Both statutes are penal. Let us put the case in this way: Suppose the election on the 13th of August, 1904, in the city of Newburgh, had resulted in the prohibition of traffic in intoxicating liquors in that city, the election having been called and ordered as it was in this case. For aught the court knows, it may have been so. Suppose prosecutions had been instituted against persons after thirty days, who persisted in unlawfully carrying on the liquor traffic. What would have been the proper interpretation of the statute, as applied in such criminal proceedings? Can there be any question that the irregular and mistaken call for the election would not be held to have vitiated the entire election, and can it be doubted that such would have been a valid and prevailing defense against any such prosecution? This seems to me to be a fair test of the strength of the position of the contestee.

But there is another feature of this case which seems to illustrate clearly the divergent operation of these distinctive statutes. The petition which was presented to the mayor of the city of Newburgh on the 20th day of July, 1904, is quoted in the petition which I have already read. It will be observed

1905.]

Newburgh Brannock Law Election Contest.

that it does not attempt to describe any residence district in the city of Newburgh, or any other district. The territory in which the election is to be held, to determine whether the sale of intoxicating liquors as a beverage shall be prohibited is simply stated to be "the city of Newburgh." The petition which is required to be filed, under the Brannock Law, by Section 3 of said act, is required to contain a description of the residence district, and by Section 4, the definition of the phrase "residence district" is sought to be afforded. Just criticism upon the grammatical construction of this section may be made, but this effort to define the phrase by a statutory definition, evidences the legislative intent to confine the operation of this statute to places and territory which are residential, in which only a certain percentage of business property can be included. This feature especially characterizes this act, and distinguishes it in a marked manner from the other laws governing the same subject-matter.

It may be said that the mayor would be presumed to know whether the city of Newburgh was in proper proportion residential territory, or was a business district, and therefore it was not necessary, in addressing the petition to him, to describe the character of the city of Newburgh, whether it was exclusively for residences, or in the proper proportion a residence district. But this does not answer the case. When a petition is presented to the mayor of the city of Cleveland by any residence district, the law does not presume that the mayor has knowledge of the fact that the district in which the election is required is a residence district, but it must be set out, by proper metes and bounds, to comply with the peculiar, detailed and exact requirements of the statute.

The answer of the contestee in this case seeks to import into the case the fact that the city of Newburgh is a residence district; that it is "a clearly described, contiguous, compact section and territory, bounded by corporate lines, and containing the number of qualified electors," etc. It must be conceded, I think, that bringing this fact onto the record does not supply its absence from the petition, and this petition must be dealt with just as it was presented to the mayor of Newburgh.

It may be regretted that the conclusion to which the court has come may be athwart the popular sentiment of the city of

Newburgh, and result in setting aside their expressed wishes at the polls. The court is not responsible for the fact that, in the trial of a contested election under the Brannock Law, the probate judge has "final jurisdiction to hear and determine the merits of the proceeding." If the election is clearly and conclusively shown to be irregular and illegal from its inception, whatever may be the opinion or sentiment of the court upon the general subject, the result must be the same.

The conclusion which the court has reached, therefore, may be summed up as follows:

1st. The election in the city of Newburgh on the 13th day of August, 1904, on the question of the liquor traffic, was sought to be instituted and carried forward under the act (97 Ohio Laws, 87) commonly known as the "Brannock Law," and not under 95 Ohio Laws, 87, commonly known as the "Beal Law."

2d. The petition under which said election was held was addressed to the mayor, and to have made the election legal under the Beal Law should have been addressed to the city council of the city of Newburgh.

3d. The petition made by favor of 97 Ohio Laws, page 87, is a fundamental and jurisdictional act, and must substantially comply with the requirements of said act.

4th. The petition filed with the mayor of the city of Newburgh, on the 20th day of July, 1904, invoking the election held on the 13th day of August, 1904, was defective in that it did not describe any residence district in the city of Newburgh, nor describe the entire city as being a residence district, or residence corporation.

It is held therefore that the election held on the 13th day of August, 1904, was illegal and void, and must be set aside, and the petition of the contestor granted.

Dunning, Tracy, Morrow & Hathaway, and Herrick & Hopkins, for the petitioner.

Wilcox, Collister, Hadden & Parks, and W. C. Pollner, for Fred Axel, Mayor of the City of Newburgh.

1905].

Mooter et al v. Whitman.

COVENANTS AGAINST LIQUOR SELLING.

[Common Pleas Court of Franklin County.]

ALMA RILLA MOOTER ET AL V. WILLIAM WHITMAN.

Decided, November 26, 1904.

Covenant—Against Sale of Intoxicating Liquor—Runs with the Land—May be Enforced by Injunction, Unless—Encouraging Breach of Covenant—Works Estoppel.

1. A covenant in a quit-claim deed against the manufacture or sale of intoxicating liquors, made by a grantee, his heirs and assigns, in favor of the grantor, his heirs and assigns, is a covenant running with the land, and is binding on subsequent grantees whether inserted in their deeds or not; and the fact that the original grantor was a tenant in common with his grantee, and the owner of only a one-fourth interest in the property, is immaterial.
2. Where it appears that the covenant as to the sale of intoxicating liquor was inserted for the benefit of the general community and adjacent lot owners, it may be enforced by any one for the sole and exclusive benefit of himself, unless, as in the case at bar, his own conduct and laches have deprived him of the right to demand such enforcement.

DILLON, J.

About the year 1890, four persons, F. D. Simons, T. A. Simons, Herman Wirth, Lafayette Wildermuth, tenants in common, platted a large number of lots in the village of Milo, this county. Immediately thereafter and in accordance with the agreement previously entered into between them, they quit-claimed to each other certain of these lots so that each became the owner in fee simple of their proportionate number of said lots. In the quit-claim deed made by Wildermuth to the other three a provision was inserted as follows:

“In consideration of the execution and delivery of this instrument the said grantees for themselves, their heirs, executors, administrators and assigns, do hereby agree with said Lafayette Wildermuth, his heirs and assigns, that they will not manufacture or sell or permit to be sold or manufactured upon said premises or any part thereof any spirituous, alcoholic or intoxicating liquors, ale, wine or beer, and that they will insert in

all conveyances and deeds for said lots that the grantees thereof, for themselves, their heirs and assigns receive and take such conveyance subject to the condition aforesaid, and that in case they or their heirs or assigns violate any of said conditions the conveyance to them shall be void and the lot or lots therein conveyed shall revert to the grantors thereof, their heirs and assigns."

Subsequently thereto, the said T. A. Simons and Herman Wirth quit-claimed the property to Franklin D. Simons without out mentioning said covenant, and Franklin D. Simons then proceeded to sell the lots by warranty deed in which no mention was made of such covenants or conditions, and it has passed through several successive owners until one of the lots was purchased by the plaintiff herein and another of the lots purchased by the defendant. The defendant has erected a saloon and is engaged in the sale of intoxicating liquors on his lot, and the plaintiff setting forth these facts prays that the defendant may be enjoined from selling or permitting the sale of intoxicating liquors upon his said lot.

The defense is that the foregoing conditions or restrictions were not made for the benefit of the plaintiff's lots and further that the said Wildermuth owned but an undivided one-fourth of the said premises, and that he had no right or power to place any restrictions or conditions upon said lot. And further that the said T. A. Simons and F. D. Simons and Herman Wirth did not place any conditions or restrictions, and they waived it by deeding away their interests without mentioning such condition or restrictions.

Further the defendant says that the said Franklin D. Simons not only deeded to the defendant his lot free from any restrictions, but that the plaintiff received her lot through the same grantor without any restrictions as to her title.

It is sufficient to say upon recital of the foregoing defenses, and upon the authorities now so well established, that none of these constitute a defense to the plaintiff's action.

For a fourth defense, however, the defendant claims that the plaintiff is estopped for the reason that she knew at the time the defendant purchased the lot the object and purpose for

1905.]

Mooter et al v. Whitman.

which he so purchased it, and intended to use it, and, knowing all this, they stood by and permitted this defendant to erect a building on said lot and make other improvements, well knowing the object and purpose for which said building was being erected, and that they made no objection thereto; that the said plaintiff endeavored to sell him her lot for the same purpose and object; that by reason of these facts the plaintiff is estopped to maintain this action.

My finding in this case is that the covenant exacted of the grantees by Wildermuth is binding even though he were but a one-fourth owner of the property, and that by the use of the words in the deed above quoted, this is a covenant running with the land, and as to which it is immaterial whether the subsequent grantees inserted the same clause in their deeds or not.

The authorities upon this point are too well settled to require this court to cite them.

It also seems manifest from the words used in this deed, and by all the circumstances of the platting of these lots that insertion of this condition or covenant was for the benefit of the general community and adjacent lot owners of the addition. And this being the case the courts have established that any person may, for the sole and exclusive benefit of himself, enforce by injunction the observance of this covenant. The action of injunction, therefore, is purely personal to the plaintiff, and for his sole benefit, and advantage. The attempted enforcement of the covenant therefore by the means adopted in this case bring to bear upon the plaintiff in this case all the rules of equity affecting such cases. Among others, it is proper for the defendant to invoke the doctrine of estoppel and laches if such be the case. Therefore, aside from the opinion of this court that the deed in question is fully sufficient to establish a covenant running with the land, and which will warrant the various forms of relief to which parties are thereby entitled, nevertheless such an order will not issue in the behalf of a particular person who by his own conduct has estopped himself.

The authorities are most numerous, and commencing with the case of *Whitney v. Union Railway Company*, 11 Gray

(Mass.), 359, this doctrine has been maintained. As stated there in a similar case to the one at bar—

“It is very clear that a suit in equity to compel a compliance with such stipulations concerning the use of property must be seasonably commenced, before the persons in possession of the estate have expended money or incurred liabilities in erecting buildings or other structures upon the premises. It would be contrary to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others and then permit him to enforce his rights and thereby inflict loss and damages upon parties acting in good faith. In such cases a prompt assertion of right is essential to a just claim for relief and equity.”

See High on Injunctions, Section 1159, and cases there cited.

The evidence in this case satisfied me that the plaintiff here not only desired and was anxious to sell her own property to the defendant before he purchased his present lot for the very uses and purposes of which she now complains, but that she stood by after his purchase and permitted him to erect the present building and go to a large expense of fitting the same up, and, therefore, as this right is purely personal to the plaintiff for her sole use and benefit, the relief sought in this case must, on principle, be as to this plaintiff denied. Exception noted. Appeal bond, \$100.

C. T. Clark, for plaintiff.

E. C. Turner, for defendant.

1905.]

Moorman v. Voss.

EQUITABLE FORECLOSURE IN PARTITION PROCEEDINGS.

[Superior Court of Cincinnati, Special Term.]

ROSE MOORMAN v. JOHN H. VOSS.

Decided, April, 1905.

Mortgage—Securing Various Notes—Upon One of Which There is a Surety—Equitable Foreclosure in Partition Proceedings—Not Res Judicata, When—Application of Proceeds—Notice to Surety.

1. Where various notes are secured by mortgage, and equitable foreclosure is sought in a partition proceeding to which both the mortgagor and mortgagee are parties, it can not be maintained that a particular note secured by the mortgage, but upon which there is a surety, was merged in the finding in the suit in partition to which the surety was not a party.
2. Neither can it be maintained that the fund realized on the mortgage was applied in whole or in part to this particular note, inasmuch as under the common law rule, which prevails in Ohio, the fund is applied in accordance with equitable principles if it be applied in accordance with the intention of the parties, whether the payment be made voluntary or by operation of law.
3. The requirement of Section 5833, as to notice by a surety to the principal debtor, must be strictly complied with, and where the principal debtor is a woman notice to her husband does not satisfy the statute.
4. In a suit against the principal debtor and the surety, it is not error to permit the introduction of parol testimony on the part of the mortgagor, to explain the words "unless otherwise satisfied" found in the mortgage.

HOFFHEIMER, J.

Heard on motion for a new trial.

This matter came on to be heard on a motion for a new trial. The action was on a promissory note. The co-defendant, Robert Moorman, made no defense. Defendant Voss urged several defenses. He claimed to be a surety merely; that, as such, he gave Mrs. Moorman, the principal creditor, sufficient notice to proceed to suit against defendant Moorman, as required by law. He also claimed that she was the owner of the note, but that, as a matter of fact, Frank Moorman, her husband, was the owner of the note. Verdict was for plaintiff.

Several grounds are assigned for a new trial, and these will be briefly considered, *seriatim*.

1. It is claimed that a certain partition proceeding, instituted in the Hamilton County Common Pleas Court, entitled *Louisa M. Voss v. Frank J. Moorman, Rose F. Moorman et al*, No. 121,778, is *res adjudicata* as to the proceeding now under consideration. In that proceeding Rose F. Moorman, plaintiff herein, was one of the parties, and it also appears she held a certain mortgage executed by Robert A. Moorman on the undivided interest of said Robert A. Moorman in the property involved, securing various notes, among others the one in controversy, and upon which defendant Voss claimed to be surety. As far as this mortgage was concerned that proceeding was merely one for equitable foreclosure. In the answer and cross-petition Rose F. Moorman makes the following prayer:

“Wherefore, this answering defendant prays that the said mortgage be satisfied out of the proceeds of sale of the property herein sought to be partitioned if sold, and in case said defendant, Robert A. Moorman, elects to take his undivided one-fifth interest in certain premises, that said mortgage attach and become a lien upon said certain premises.”

So that it will be observed there was no prayer for personal judgment as against Robert Moorman *or this defendant Voss*. The notes secured by the mortgage were not set out, nor, as a matter of fact, were they sued upon. Mr. Voss was not made a party by the cross-petition, and was in no sense before the court on this matter. In this regard the case is to be distinguished from *Brigel v. Creed*, 65 O. S., 40, relied on by counsel for defendant. In the *Brigel* case it will be observed the surety, Mrs. Brigel, was a party to both actions, and the finding was against her and her husband in the first case. Upon the answer and cross-petition of Rose F. Moorman, the court made a “finding,” but not a judgment (*Maley v. Murray*, 2 Nisi Prius, 614; *Commissioners v. Rhodes*, 26 O. S., 644). And under the circumstances, therefore, we think the claim untenable that the particular note sued on in this action was merged in that finding.

1905.]

Moorman v. Voss.

2. Neither can it be claimed that the money realized on said mortgage was applied in whole or in part to this particular note. The court, in the partition proceedings, found a certain amount due Mrs. Moorman upon the mortgage, and it was ordered paid on account. Was it not her right to apply this money according to the intention of the parties to the mortgage? I am of opinion that it was, especially if the intention of the parties to the mortgage could be ascertained (*Gaston v. Barney*, 11 O. S., 506). Under instruction from the court the jury doubtless ascertained what the intention of the parties to the mortgage was (the language of the mortgage seemed ambiguous on this point), and it found that Mrs. Moorman applied the proceeds in accordance with the intention of the parties, to notes 1, 2 and 3, which were notes upon which Robert A. Moorman stood alone. The defeasance clause of said mortgage was as follows:

"Provided, nevertheless, that if the said mortgagor, Robert A. Moorman, pay or cause to be paid the following promissory notes of his hereafter designated 1, 2 and 3; and that unless otherwise satisfied he pay or cause to be paid the following obligations herein designated 4 and 5," etc.

Obligation 4 is the note in controversy. Therefore, unless the law applied the proceeds realized to all the notes secured by the mortgage, then no part of said proceeds was applied to obligation 4. Mr. Cash contends, that Mrs. Moorman might have made the application of the proceeds as she claims it was made by her, had the payment been voluntary; that inasmuch as the payment was involuntary—made by operation of law—the proceeds are to be applied to all the notes in accordance with "equitable principles" (*Jones on Mortgages*, 6th Edition, 1683a). As pointed out by counsel for plaintiff, this writer evidently follows *National Bank v. Moore*, 112 N. Y., 543. But there seems to be a decided difference of opinion in the courts of the various states as to what application "equitable principles" require, the difference arising, no doubt, because some of the states follow the civil law and others the common law. The New York case follows the civil law. As far as this state is concerned, however, the questions seems to be settled in

Gaston v. Barney, *supra*, which case cites with approval *Bank v. Benedict*, 15 Conn., 437, which is a foreclosure case. Ohio follows the common law.

It seems, therefore, that the fact that the payment of the money to Mrs. Moorman was involuntary, that is, obtained under the foreclosure of the mortgage, would make no difference.

3. During the progress of the trial, the court ruled that *notice* to Frank Moorman, husband of plaintiff, by defendant Voss, was insufficient, under Section 5833, to discharge Mr. Voss as surety, if he was such. Said section is as follows:

“A person bound as surety in a written instrument for the payment of money, or other valuable thing, may, if a right of action accrue thereon, require his creditor, by notice in writing, to commence an action on such instrument forthwith, against the principal debtor; and unless the creditor commence such action within a reasonable time thereafter, and proceed with due diligence, in the ordinary course of law, to recover judgment against the principal debtor for the money or other valuable thing due thereby, and to make, by execution, the amount thereof, the creditor, or the assignee of said instrument, so failing to comply with the requisition of such surety, shall thereby forfeit the right which he would otherwise have to demand and receive of such surety the amount due thereon.”

And the court held that said notice was insufficient, because the surety failed to *strictly* comply with the terms of the said statute by failing to serve notice upon Mrs. Moorman herself. Defendant contends that said section is to be liberally construed, and that the notice given by Voss to the plaintiff's agent (husband) was sufficient. There was also testimony tending to show that Frank Moorman was agent for his wife in the matter of said note, at certain times. Many states have statutes substantially similar to our own that provide for service of written notice on the creditor to sue, by one claiming to be a surety.

Referring to the *notice*, a writer on suretyship says:

“Notice must be delivered to the creditor *in person* and not to his agent” (Pingree on Suretyship, Section 145).

1905.]

Moorman v. Voss.

In *Coy Kendall v. Constable*, it seems that notice to the attorney is insufficient (*Coy Kendall v. Constable*, 48 Hun., 360).

In a case where the notice was to creditor's attorney and directed him and not the creditor to institute proceedings, the court said:

"It is clear, we think, that the written notice described in this paragraph of the answer is not such a notice as the section quoted requires to be given. The remedy given by Section 672 of our code of practice to sureties upon written contracts is purely a statutory remedy, and has never been regarded as part of the common law (*Halstead v. Brown*, 17 Ind., 202.) The surety who desires to avail himself of the remedy must do just what Section 672 (compare Section 5833, Revised Statutes of Ohio), in plain terms, requires him to do; he must, by written notice, require the creditor or obligee to institute an action on the contract. The notice in this case is insufficient" (*Driskoll v. Commissioners*, 53 Ind., 532. See, also, *Trustees v. Southard*, 31 Ill. App., 359, at page 364; *Davis v. Snead*, 33 Grattan, 705, at pages 708, 709; *Suffington v. Jeffries*, 15 Mo., 628).

In the latter case the notice was given to the attorney or agent of the person having the right of action, and the court said he was not the person to be served with notice under the terms of the statute, and that the surety is held *strictly* to pursue the terms pointed out by the statute before he can recover.

It is often said a surety is a favorite in the law. Even if that is true, we see no reason why he should be permitted to evade his fixed, definite responsibility to the principal creditor by failing to strictly comply with the terms of a statute purposely enacted in his favor.

In *Clark v. Osborn*, the court said:

"The suretyship is accepted with knowledge of its terms. It gives rights to both parties. The right of the creditor is to *disregard with impunity* any notice, not *in strict conformity* with its terms" (*Clark v. Osborn*, 41 O. S., 28).

In view of the foregoing, I must adhere to the ruling made during the trial, namely, that Section 5833, Revised Statutes, must be strictly complied with; and that inasmuch as there

Bergin v. Braun.

[Vol. III, N. S.]

was no notice to the plaintiff, the notice to her husband was insufficient in law, and could not work a discharge of the surety.

4. It is also contended that the court erred in permitting Robert Moorman to give parol testimony to explain the words "unless otherwise satisfied" (*McMasters v. Insurance Company*, 55 N. Y., 222, seems to sustain the position of the court.)

The motion for a new trial must be overruled.

Denis F. Cash, for the motion.

Stephens, Lincoln & Stephens, contra.

RIGHTS OF SUB-CONTRACTORS AFTER DEATH OF PRINCIPAL CONTRACTOR.

[Common Pleas Court of Franklin County.]

BERGIN V. BRAUN.

Decided, January 4, 1905.

Contractor—Death of Principal Contractor—Rights of Sub-Contractors Thereafter—Claims of Other Creditors Superior, When—Liens for Labor and Material.

1. The rights of sub-contractors are fixed and determined at the death of the head contractor, unless his personal representatives undertake to complete the work.
2. A fund due the head contractor at the time of his death, but remaining in the possession of the owner of the property, is subject to the lien of the sub-contractor for labor and material furnished prior to the death of the head contractor, and the perfecting of such lien can not be prevented by the personal representatives of the deceased head contractor.
3. Creditors of a head contractor are entitled to priority over a sub-contractor, where they secure their claims prior to the giving of notice by the sub-contractor to the owner.

BIGGER, J.

This case is submitted under the provisions of Section 5207, Revised Statutes, which authorizes parties having a controversy to submit it to the court upon an agreed statement of facts.

As this statement is somewhat lengthy, I will not now stop to recite the facts, but will state my conclusions.

1905.]

Bergin v. Braun.

The questions here presented are of interest and somewhat unusual and apparently have not been before the courts of this state so far as appears from any reported cases.

After a somewhat careful consideration of the questions here raised, I am of opinion that the mechanic's lien of Bergin is a valid lien and entitled to priority over the other claimants; that the defendant, Braun, has no lien, and that the administrator of Westcamp's estate is entitled to the remainder of the fund after the payment of the lien of Bergin. In brief, my reasons for this decision are these:

Upon the death of Westcamp the contract between him and Marion was terminated, or at least it was within the power of his personal representatives to terminate it with the consent of the court, which was done (8 Ohio State, 450).

The mechanics lienors were sub-contractors performing labor and furnishing material under the contract with Westcamp, the head contractor. They could not after his death either perform labor or furnish material so as to charge his estate. Their rights, whatever they were, were fixed and determined at the death of the head contractor unless his personal representative should see fit to complete the same under the original contract. From this it follows that the defendant, Braun, not having served notice upon the owner within ninety days from the date of his death, and that of the furnishing of the last material and labor which in my view of the case he could furnish so as to charge the head contractor, has no mechanic's lien and his attempt to perform some labor under this contract after the death of Westcamp, and after the contract had been terminated under which the labor was performed and material furnished, was ineffective to save the notice of March 21, which was subsequent to the time the contract was annulled, from the bar of the statute.

It was, however, the right of sub-contractors having performed labor and furnished material before the death of the head contractor to perfect their lien after his death as provided by law. Their rights had attached under the contract prior to the death of Westcamp by the furnishing of labor and material, and his death could not prevent them from taking

those steps which were necessary under the mechanics' lien law to preserve their lien. The labor was performed and the material furnished under the contract during its existence, and the law furnishes the remedy to such sub-contractors which can not be taken away by the death of the head contractor. The personal representative stands in no better position than the head contractor and can no more defeat the right of sub-contractors who have taken the requisite steps to perfect their liens than could the head contractor.

It seems to me that the case here presented is not analogous to that of a *bona fide* assignment of a claim by a head contractor, or the appointment of a receiver at the suit of creditors. The law looks with a favorable eye upon a diligent creditor, and where they have taken steps to secure their claims prior to the notice by the sub-contractors to the owners, the rights of the sub-contractors are inferior to the rights of such creditors.

But I do not see any force in the contention that a fund due to the head contractor at the time of his death, but not having passed into his possession, nor afterwards into the possession of his personal representative, but still remaining in the hands of the owner, is not subject to a lien in favor of the sub-contractor, who takes the requisite steps to perfect his lien under the statute. From this it follows that the plaintiff has a valid lien upon the fund which is prior to any right of that of the administrator of Westcamp. The defendant, Braun, however, having secured no valid lien, stands only in the position of a general creditor of the estate of Westcamp.

While I find no cause in which the exact questions here raised were decided, I call attention to a case decided by Judge Storer of Cincinnati and reported in 2d Disney, at page 184, which is somewhat similar and instructive.

L. F. Sater, for plaintiff.

Snyder & Clutce, for defendant.

1905.]

State, ex rel, v. Gilfillan et al.

ALLOWANCES TO TAX INQUISITORS.

[Common Pleas Court of Franklin County.]

THE STATE OF OHIO, EX REL AUGUSTUS T. SEYMOUR, PROSECUTING ATTORNEY OF FRANKLIN COUNTY, OHIO, v.
BAILEY W. GILFILLAN ET AL.

Decided, May 31, 1905.

Taxation—Omitted Returns—Appointment of Inquisitors for Discovery of—Unconstitutional Sections—The Limitation in Section 1343-4 Should be Disregarded—Tax Inquisitor an Employee—Valid and Invalid Features—Of Inquisitorial Contracts—Percentages Disallowed on Penalties—Discoveries of Omitted Property from Probate Court Inventories—Real Estate—Exclusive Privileges.

1. Sections 1343a and 1343b, providing for the employment in certain counties of persons to discover property omitted from the tax duplicate and providing penalties for the omission thereof, are unconstitutional for the lack of uniformity of operation.
2. The limitation found in Section 1343-4, upon the operation of Sections 1343-1, 1343-2 and 1343-3, should be disregarded and these statutes upheld.
3. The duties of a tax inquisitor are not those of a public officer but of an employee, and the provision for his appointment rather than election is therefore not open to constitutional objection.
4. Contracts entered into by county officers with tax inquisitors are not illegal because they stipulate for the payment of a percentage on real estate which the inquisitor causes to be returned for taxation; or because of a severable provision for the payment of a percentage to the inquisitor on penalties; or because they empower the inquisitor to compel the auditor to hold examinations of owners of omitted property at his request and in his presence; or because of the clothing of an inquisitor with an exclusive privilege; or because the contract possesses a prospective operation; or because the policy of making such contracts, or of paying so large a percentage for the work performed, does not meet with the full approval of the courts; or because of failure to enter the contracts in the minutes of the county commissioners as provided in Section 878; or because an inquisitor who gave bond in accordance with the statute and the contract, failed to sign the contract; or because there is no finding on the commissioners' record that they had reason to believe at the time the contract was

made that there was property within the county which had been improperly omitted from taxation.

5. A tax inquisitor is not entitled to a percentage on the fifty per cent. penalty added by law, or to any percentage on penalties levied and collected as such, and where there is a provision in the contract for the payment of a percentage on penalties, it will be disallowed.
6. An inquisitor is not excluded from furnishing evidence of omitted property to be listed in the name of a decedent, and may discover the existence of such property from inventories filed in the probate court, but his compensation will be limited to a percentage on taxes collected on property which should have been returned in the lifetime of the decedent.
7. An auditor is not bound to assume that the returns for taxation as made are false, and the inquisitor in this case is entitled to a percentage on taxes collected on additions made to the returns for preceding years of insurance companies.

RATHMELL, J.

In this action it is sought to enjoin the defendant, Gilfillan, from presenting any vouchers to the auditor of this county on account of compensation claimed by him under certain contracts mentioned in the petition; the auditor, L. Ewing Jones, from issuing to him any warrants on account of such compensation so claimed; and the treasurer, Bowland, from paying any such warrants; that certain acts of the General Assembly described in the petition be declared unconstitutional; the contracts illegal and void; and that relator may be granted such other relief as he may be entitled to in equity and law.

The petition avers that the county commissioners, the county auditor and the county treasurer, entered into certain contracts with the defendant, Gilfillan, on the dates respectively, January 22d, 1897, January 26th, 1900, and December 24th, 1902, providing that said defendant, for certain percentages therein mentioned, should search for real and personal property subject to taxation which the owners thereof have neglected to list for taxation, and to furnish the auditor such evidence as will authorize an examination of such owners as to such property and to subject same to taxation.

That the defendant, Gilfillan, now claims under services alleged to have been rendered by virtue of such contracts that he

1905.]

State, *ex rel.*, v. Gilfillan et al.

is entitled to receive the stipulated percentages on any taxes on property so improperly omitted from the duplicate whenever such taxes will have been paid into the treasury; and will when so paid present vouchers for such compensation.

1. It is averred that the several contracts were drawn and executed in accordance with Sections 1343*a* and 1343*b*; or in accordance with 1343-1, 1343-2, 1343-3 and 1343-4 of the Revised Statutes of Ohio, and are illegal and void and not authorized by any valid statute; that Sections 1343*a* and 1343*b* of the Revised Statutes of the act of the General Assembly passed April 23d, 1884, are void, being repugnant to Section 26, Article II of the Constitution of the state, which provides that "all laws of a general nature shall have a uniform operation throughout the state."

The Supreme Court of the state has made expression that the character of a law as general or local depends on the character of the subject-matter. That when the subject of legislation is a matter of general concern to the state and to every county in the state and to the inhabitants thereof, it is of general nature (*Kelley v. The State*, 6 O. S., 271, 272; *State, ex rel. Guilbert, v. Yates*, 66 O. S., 546, 548).

The subject of this law, the employment of persons to discover property improperly omitted from the tax duplicate, is plainly one which may exist in, concern and affect the people of every county in the state. The fact that the General Assembly has, by two enactments, similar in substance, on this subject, covered the territory of the state, would seem to be conclusive that, in its view, the subject was one of general nature.

The explicit language of Section 1343*a* leaves no room for doubt as to the scope and operation intended to be given to the act of April 23d, 1885. It was limited to counties of the state containing a city of the first class, and cities of the first grade of the second class. Under existing legislation at the time of its enactment the legislative intent that its operation was not to be uniform throughout the state is apparent. The conclusion follows that said sections contravene that provision of the Constitution, and are, therefore, invalid.

2. The law of April 10th, 1888, and numbered Sections 1343-1, 1343-2, 1343-3 and 1343-4 of the Revised Statutes is challenged on the same ground. In *State, ex rel, v. Crites*, 48 O. S., 142, this law was under consideration by the Supreme Court and pronounced constitutional.

Counsel for relator suggest that the objection now raised in opposition to the act (Section 26, Article II of the Constitution) was not passed on in that case. But counsel for the defendants contend that the law is not repugnant to that provision. That if the act of 1885 (Sections 1343a and 1343b) was not a proper subject for local legislation (as we have held) then the enactment was void and the uniform operation of the act of 1888 was secured.

The rule is well established that part of a statute may be unconstitutional and void and another part valid, if what remains is complete in itself and capable of being enforced according to legislative intent, independent of that which is rejected (*Presser v. Illinois*, 116 U. S., 252; *Treasurer v. Bank*, 47 O. S., 523, authority for the proposition).

The enacting clauses of the act of 1888 are general in their terms, applying to "any county," "any assessor," etc. But Section 1343-4 contains the language:

"This act shall not in any manner affect the provisions of Sections 1343a and 1343b as enacted April 20th, 1885 (82 O. L., v. 152)."

Will striking out this language give the act a broader scope as to subject or territory than the General Assembly intended? The answer to this question will be determined by the construction given to Section 1343-4, *i. e.*, whether it amounts to a *limitation* or an *exception*.

In *State, ex rel, Wilmot, v. Buckley*, 60 O. S., 296, the court, speaking through Burket, J., said:

"There is a difference between an exception and a limitation. When a statute upon a subject of a general nature is made to extend to the whole state in one part thereof, and then in another part an attempt is made to limit its operation to territory less than the state, the limitation may be disregarded; because to give it effect would render the whole statute unconstitu-

1906.]

State, ex rel, v. Gilfillan et al.

tional; and such construction should be given when reasonable as will uphold the statute rather than one which would defeat it."

We incline to the view that this principle of construction finds application here.

It is the purpose of the state that all property subject to taxation shall be equally taxed. The general purpose of the Legislature as appears by all the acts on this subject was to afford means whereby property which has escaped taxation might be brought upon the duplicate:

Is the limitation in this Section 1343-4 of the act so essentially and inseparably connected with, or so interdependent upon the rest of the act, that it can reasonably be claimed that the General Assembly would not have enacted the one without the other? I do not so conclude. If there is any doubt about it, such doubt should be resolved in favor of the law. (*Wilson v. Gibson*, 1 N. P.—N. S., 565; *State v. Kendle*, 52 O. S., 346, 356; *Gilpin v. Williams*, 25 O. S., 283, 294; *State v. Frame*, 39 O. S., 399, 416).

In view of the constitutional approval which the Supreme Court gave this act of April, 1888, in the Crites case, *supra*; and considering that the statute is upon a subject of general nature, and made, in the enacting clause, general in its scope; and viewing the matter of Section 1343-4 as an attempt to limit its operation to territory less than the state, the limitation will be disregarded, and the statute upheld.

3. It is further contended that the act of April 10, 1888, is in conflict with Section 1, Article X of the Constitution. That the duties which defendant, Gilfillan, is discharging as tax inquisitor are duties of a county officer, and, therefore, he must be elected.

The courts have declared that the distinguishing characteristic of a public officer is that the incumbent in an independent capacity is clothed with some part of the sovereignty of the state to be exercised in the interest of the public as required by law; that he is not a mere employe; that the tenure and position of the officer is of a continuous character as opposed

to a temporary employment; or employment for a definite and particular purpose. (*State, ex rel Armstrong, v. Halliday*, 61 O. S., 171, 172; *State, ex rel Atty.-Genl., v. Jennings*, 57 O. S., 415, 426; 1 N. P.—N. S., 565).

The work imposed upon the person to be employed by the officers mentioned in the statute is "to make inquiry and furnish the *auditor* the facts as to any omissions of property for taxation and the evidence necessary to authorize *him* to subject to taxation any property improperly omitted from the tax duplicate." He is an employe. He is an aid to the taxing officer. His duties arise out of contract; and his employment is dependent for its duration, its extent and character, upon the terms of the contract, and is for a definite and particular purpose.

"The power of the Legislature," says Minshall, J., in *State v. Kendle*, 52 O. S., 356, "to provide for the appointment of persons to act as assistants in an office filled by election has not and can not well be questioned."

A similar question was under consideration in the case of *State, ex rel Wilson, v. Gibson*, 1 N. P.—N. S., 565, which was affirmed by the Supreme Court, February 16, 1904, and holding adverse to the claim of the relator in this case. It seems to me that the question comes within the principle decided in that case and is not in conflict with Section 1, Article X of the Constitution.

4. Our conclusion reached as to the validity of Section 1343a and 1343b makes it unnecessary to consider the question made as to the repugnancy of those sections, to Section 1, Article XIV of the amendments to the Constitution of the United States.

5. It is further claimed that the said several contracts are respectively unauthorized, illegal and void for the reasons:

(1) That they stipulate for percentage on all money paid into the county treasury as taxes on improperly omitted *real estate* which the inquisitor may claim to have discovered and procured to be returned for taxation.

1905.]

State, ex rel, v. Gilfillan et al.

The claim is made that the statute does not authorize employment with respect to omitted real estate. That payment is limited to omitted personal property.

The petition recites that under the contract of January 26, 1900, the defendant, Gilfillan, claims to have furnished information on October 5th, 1900, to the auditor upon which the auditor entered upon the omitted tax duplicate, on account of real property improperly omitted from the duplicate, in the name of Alice Gollins (valuation \$800), for the years 1895 to 1900, on which said defendant claims compensation at the rate mentioned in the contract, \$27.26. And a like claim of \$4.95 for information furnished the auditor upon which he entered taxes on real property of Peter Freibus, for the year 1904, valuation \$1,650.

A contract made in pursuance of a statute must be construed as though such statute had been incorporated into such contract; and this is so whether such law affects its validity, construction, discharge or enforcement. (*Banks v. DeWitt*, 42 O. S. 263; *Holbrook v. Ives*, 44 O. S., 516, 524; *Compton v. Ry. Co.*, 45 O. S., 592, 619.)

It is a fundamental principle of construction that effect must be given to the intent of the Legislature, and where that intent is plainly expressed the language must be taken in its plain and ordinary signification. But where the court is confronted with an ambiguity, or an absurdity would arise from giving the language its ordinary meaning, the rules of construction are invoked to ascertain the true legislative intent. (23 A. & E. Ency. of Law, 412.)

The authority of the statute is, "to employ any person to make inquiry and furnish the county auditor the facts as to *any omissions* of property for taxation and the evidence necessary to authorize him to subject to taxation *any property* improperly omitted from the tax duplicate."

What is the scope of the inquest, the plain and ordinary signification of the language "*any property*," "*any omissions of property*," "*a full return of property*" used in the statute?

The court in the Crites case said that—

"The statute (85 O. L., 170) must be regarded as part of the general plan by which the constitutional rule that all property subject to taxation is to be equally taxed may be enforced."

The title to the act of 1880 (77 O. L., 205) where the language conferring the power to employ the tax inquisitor and that which designates the property with respect to which he might act, is substantially the same as that in the act under consideration, recites: "An act to more fully secure the taxation of *real and personal* property," etc.

The title to the present act is: "To secure a fuller and better return of *property* for taxation, and prevent *omissions* of *property* from the tax duplicate." If the Legislature has changed its intent as to the scope of the inquest of real and personal omitted property since the act of 1880, it has not so indicated such change of intent, in its retention and use of general terms applicable to both kinds of property in the present act.

In *State, ex rel Deckenbach, v. Hagerty*, 5 C. C., 325, 328, the court, considering the object, purpose and evil sought to be corrected by 1343a, was of the opinion that the language "improperly omitted property" should be held to include the case where a *part* of the valuation of *real* property on the duplicate had been improperly omitted therefrom. By so much the more would such language include a case where real property is entirely omitted. But it is the contention of relator that the language: "And such compensation shall not exceed 20 per cent. of the amount of such taxes on the returns of omitted moneys, credits, investments in bonds, stocks, joint stocks, annuities or other valuable interests," limits payment to taxes on the inquest of personal property. That the phrase "*other valuable interests*" under the doctrine *noscitur a sociis* refers to the same kind of property as the words and phrases preceding it.

Said Section 1343a contains a provision for payment, but has no express limitation of compensation by certain percentages corresponding to the clause under consideration in Section 1343-1. It is observable, however, that the same general terms

1905.]

State, ex rel, v. Gilfillan et al.

relating to property improperly omitted and payment, used in 1343a and which have been held to include a case of quest of real property, are used in 1343-1 down to the percentage clause. In my judgment the effect of the language of said percentage clause in Section 1343-1, is to limit the payment on quest of personal property to 20 per cent., but that it is not decisive of, or prohibitive of the right to contract for quest of omitted realty. It has not been contended or suggested that the discovery of omitted realty is not as advantageous to the public as that of omitted personalty. And viewing the statute as a part of the plan to aid in subjecting all taxable property to equal taxation together with its history, and the plain and ordinary signification of the terms, "any property," "a full return of property," "any omissions of property" employed therein, I am of the opinion that the several contracts in stipulating payment for information necessary to authorize the auditor to subject to taxation improperly omitted real property were not unauthorized.

(2) That the contracts are illegal because they severally stipulate for payment of percentage on penalties added by the auditor to improperly omitted property through his efforts and to which a penalty may be added or is required by law to be added to the lawful tax.

The information called for by such employment and such as is authorized by the statute is such as will authorize the auditor to subject to taxation any *property improperly omitted* from the tax duplicate. And the statute (Section 1343-1) provides that "payment for such service shall be made *only* out of money actually paid into the treasury as taxes on such omitted property."

By Section 2781, the proceeding, in case of a false return or an evasion in making a return, is for the auditor to ascertain as near as practicable the true amount of property that such persons ought to have returned or listed for certain years and to the amount so ascertained as omitted for each year he shall add fifty per centum, multiply the *omitted* sum or sums and as increased by said penalty by the rate of taxation belonging to said year or years and enter the same on the tax lists.

Is the money paid into the treasury on the property so ascertained by the auditor as that which the tax-payer should have returned increased by the fifty per cent. addition thereto paid as "*taxes on such omitted property*" within the meaning of Section 1343-1? Or is it something more?

It is the claim of the relator that the money so derived is in part penalty.

The contention of the defense is that the fifty per cent. so added is simply the basis whereby the amount of taxes to be paid by the person who has failed to return his taxes according to law is ascertained. That it is not strictly penalty. That the intent of the statute (1343-1), is that the inquisitor shall have his percentage upon the amount of money paid into the treasury by his efforts.

It is observed by Minshall, J., in *Gager v. Prout*, 48 O. S., 89, 109, that—

"The provision for the addition of the amount omitted in the return of the tax-payer, and that for the addition of a penalty, are clearly separable. It is not necessary to impose a penalty that an addition may be made of what has been omitted. Under the statute, mere verbal criticism aside, the true amount omitted by the individual may be placed on the duplicate with the tax extended thereon without first increasing the addition by a penalty of fifty per centum."

And on page 105 the court say:

"The object of this section is not merely to afford a remedy for the recovery of what is due the state under its system of taxation, but also to secure honest returns by adding a penalty to the making of false ones. It is conceded that the state may for this purpose add a penalty to the tax itself. What difference, then, can it make so far as any substantial right of the individual is concerned whether he is made to feel the penalty for a false return in the *basis* on which he is taxed or in the rate of the tax itself."

Section 2781 denominates this fifty per cent. increase as "penalty" and seems to clearly distinguish the "*omitted property*" which the auditor in the proceeding has ascertained as that which the tax-payer should have returned, from this

1905.]

State, ex rel, v. Gilfillan et al.

“addition” which the law requires he shall add in case of a false return.

What is the reasonable import of the language, “money actually paid into the treasury as taxes on such omitted property” as used in this section?

The court in *Slingluff v. Weaver*, 66 O. S., 621, 628, say:

“The province of construction is to arrive at the true sense of the language of the act, not to supply language to help out a conjectured intent not to be gathered from the words used. The question is not so much what did the Legislature intend to enact as what did it mean by what it did enact.”

In *Brower v. Hunt*, 18 O. S., 311, 341, the court apply the rule as stated by Story, J., as follows:

“What the legislative intention was can be derived only from the words they have used, and we can not speculate beyond the reasonable import of these words. The spirit of the act must be extracted from the words of the act and not from conjectures *aliunde*.”

In *Rhodes v. Weldy*, 46 O. S., 234, the principle is laid down that—

“Where the same word or phrase is used more than once in the same act in relation to the same subject-matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former unless there is something in the connection in which it is employed plainly calling for a different construction.”

I apprehend that the words “such omitted property” refer to and have the same import as “property improperly omitted” in the preceding clause of the section; and means the true amount of property which the auditor ascertains, in such case, the tax-payer ought to have returned or listed. The meaning of this “property improperly omitted” so ascertained by the auditor in such a proceeding is not in doubt. It is clearly separable and differentiated from the fifty per cent. addition or penalty required by the statute to be added in such a case to get the basis of taxation for that year. The true amount

of the property being found, the penalty is added with the same certainty that the tax itself is entered (*Ratterman, Tr., v. Ingalls*, 48 O. S., 484).

If the meaning of "omitted property" in the former part of the section is thus clear and definite, it must follow under this rule of construction that such words should receive the same construction in the latter part of the section unless there is something in the connection in which it is employed plainly calling for a different construction, and I do not see that there is.

I am of the opinion that the inquisitor's percentage under the statute is limited to the taxes paid into the treasury on the omitted property, *i. e.*, the property which the auditor finds the tax-payers should have returned; and is not entitled to percentage on the money derived from the tax-payer on the penalty added by the law to such omitted sum ascertained by the auditor as that which should have been listed; or to any percentage on penalties levied and collected as such.

The consideration or percentage provided in the contracts on omitted property being severable from the percentage on the fifty per cent. addition, the contracts are not illegal or invalidated in stipulating for percentage on the *omitted property*, though unauthorized as to the *penalty* on such omitted property (9 Cyc., 569).

(3) That they empower the inquisitor to compel the auditor to hold examinations of owners of omitted property at his request and in his presence whenever deemed advisable.

It is not claimed or shown by evidence that any such situation ever arose between the auditor and the inquisitor as that a request was made for an examination which it was not deemed advisable by the auditor to hold. The proposition is not argued by relator, and it does not appear that it is seriously relied upon in the case. It may be observed, however, that since it is the duty of the auditor to act when reasonable information is presented, and on his failure to do so the inquisitor could by a proceeding in mandamus compel him to, as in the *Crites* case, *supra*, we fail to see that an agreement to hold examinations of owners of omitted property whenever deemed advisable, and

1905.]

State, ex rel, v. Gilfillan et al.

on request (*i. e.*, reasonable request), invalidates the contract or exceeds the authority conferred by the statute.

(4) Because said contracts severally award to said Gilfillan the exclusive right to procure and produce evidence before the auditor with respect to omitted property.

The statute provides that the officers mentioned shall have the power to employ "any person."

The contracts severally stipulate that the employment of defendant, Gilfillan, for the period mentioned in the contract was to be exclusive of all other persons.

The matter of the employment of the inquisitor being discretionary with the officers mentioned in the statute, it is likewise a part of their official discretion to determine whether one or more persons are necessary to accomplish best the purpose of the statute. It is not the rule of courts to set their discretion against that of the officials in such a case, while acting within the limits of the statute. While the employment in this case has been made exclusive, we fail to see that this interferes with the right or duty of the auditor to receive or to act upon information obtained otherwise than through the inquisitor, with respect to omitted property.

(5) That the contract is unauthorized because it has a prospective operation, *i. e.*, that it provides for and authorizes the payment of percentage on taxes on property improperly omitted from the duplicate and put on the tax duplicate by his efforts after the date of the contract as well as upon taxes on such property improperly omitted prior to the date of said contract.

The *officers* mentioned in the statute, "when they have reason to believe that there has not been a full return of property within the county for taxation, shall have power to employ any person to make inquiry and furnish the county auditor the facts as to *any omissions of property* for taxation, and property improperly omitted from the tax duplicate."

The act does not contain language expressly limiting the inquisition to property improperly omitted prior to the date of the contract.

My attention is called to the fact that the first act relating to the tax inquisitor (77 O. L., 205) contained a limitation as follows: "Provided, however, that such employment shall only be authorized as to any omissions occurring previous to the passage of this act." In the two subsequent acts the proviso is omitted from which it is contended the legislative purpose to remove the limitation which had existed with respect to such contracts was indicated.

In the Crites case, *supra*, the contract, under the act in question, was allowed to have a prospective operation; though the question does not appear to have been made in the case.

The inquiry provided by the statute goes to "any omissions of property for taxation"; to subject to taxation "any property improperly omitted." The purpose of the statute is to aid in enforcing the constitutional rule that all property subject to taxation shall be equally taxed.

It is a canon of interpretation that language susceptible of more than one construction is to receive that which will bring it into harmony with the purpose of the statute rather than that which would tend to defeat it (23 A. & E. Ency., p. 319).

It was held in the Lewis case (12 O. D., 46) that three years was not an unreasonable time for such a contract. The contention of relator that inquiry in respect to property improperly omitted after the date of the contract can not be contracted for, if that construction prevailed, would seem rather to defeat than to aid the purpose of the law by bringing upon the duplicate all taxable property.

In the case of *State, ex rel Wilson, v. Lewis*, No. 51985, Superior Court, Cincinnati, the court, as appears by the entry in the case, sustained a demurrer to the petition containing the question here presented; that the tax inquisitor was authorized to furnish evidence with respect to property that was omitted from the tax list subsequent to the date of the contract as well as prior thereto—thereby apparently adopting a construction opposed to the contention of the relator.

I am of the opinion that this contention of relator that the contracts are illegal in authorizing the payment of percentage in respect to property improperly omitted from the duplicate

1905.]

State, ex rel, v. Gilfillan et al.

and put on the duplicate by the efforts of the inquisitor after the date of the contract is not well taken.

(6) Having found reasons for upholding the statute on which the several contracts are based, it is sufficient to state, on the contention of relator, that the contracts are against public policy, and that the compensation stipulated to be paid to the inquisitor is exorbitant and unreasonable; that there can be no public policy or right in conflict with a constitutional statute. The statute has declared the public policy as to inquisitor contracts and fixed the compensation and the courts can not declare a different policy (*Probasco, Exr., v. Raine, Auditor*, 50 O. S., 378; *Ohio Oil Co. v. Lane*, 59 O. S., 307, 317; 9 Cyè., 482; *State, ex rel Wilson, v. Gibson*, 1 N. P.—N. S., 565).

(7) That said contracts of January 26th, 1900, and December 24th, 1902, were never entered in the minutes of the proceedings of the county commissioners under and in accordance with the provisions of Section 878 of the Revised Statutes.

Section 878 is a provision as to contract entered into by the county commissioners as such. The contract provided for in Section 1343-1 to be made by the commissioners, auditor and treasurer, or a majority of said officers, is not in my judgment such a contract as is contemplated in Section 878. Section 1343-1 designates the *persons* who are required to make the contract and does not have reference to the performance of an act by officers merely as such. Such a contract might be entered into by the participation of a single commissioner in conjunction with the auditor and treasurer, in which case it is apparent that it was not entered into by the commissioners. The distinction in *Hulse v. The State*, 35 O. S., 426, seems applicable. It is urged in good point, it seems to us, that if Section 878 were applicable to such a contract as the one in question, since the county has accepted and enjoyed the benefit contracted for, it would be estopped from setting up its omission to make the entry. (*Wilder v. Commissioners of Hamilton County*, 41 O. S., 601, 602; *Commissioners v. B. S. L. R. Co.*, 37 O. S., 205).

(8) That the contract of January 26th, 1900, was not signed by said Bailey W. Gilfillan.

The contract was signed by the special officers or persons designated in the statute and Gilfillan gave his bond in accordance with the statute and contract and acted under the contract. It is to be observed that the statute is silent as to the form of the contract except as to the bond which shall be filed with the auditor. The contract being in writing and signed by the special officers required, satisfies the requirement of Section 4199 of the Revised Statutes upon the point of the time limit fixed in the contract. (*Muscatine Water Co. v. Muscatine Lumber Co.*, 85 Iowa, 112; *Dowes v. Morse*, 62 Iowa, 232.)

(9) That there is no finding upon the commissioner's record that said commissioners had reason to believe that at the time said contract was made there was any property improperly omitted from taxation in Franklin county.

The statute provides that when said designated officers or a majority of them *have reason to believe that there has not been a full return of property* within the county for taxation they shall have power to employ, etc.

It is contended by relator that such a finding upon the commissioners' record is essential as a condition precedent to any valid action by such officer.

We have reached the conclusion hereinbefore that it was not essential to the validity of the contract that it be entered in the minutes of the proceedings of the commissioners.

Section 1343-1 does not require, and my attention has not been called to any section which requires entry of *such reason for belief* on any record. It appears that a contract was entered into between the designated officers and the inquisitor. Acts done which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter. It has not been sought to show that reason for belief did not exist on the part of the officers but that no record of it was made. In respect to official acts the law will presume all to have been rightfully done unless the circumstances of the case overthrow this presumption. *Lessee of Combes et al v. Lane*, 4 O. S., 112; *Lessee of N. Ward v. Barrows*, 2 O. S., 242; *Reynolds et al v. Schweinefur*, 27 O. S., 311, 319).

1906.]

State, ex rel, v. Gilfillan et al.

In the absence of a statute requiring such entry upon the commissioners' record I am of opinion that the contract is not invalid for the reason assigned, viz., that there was no record finding.

6. The claim is made in the petition that the defendant, Gilfillan, is not entitled to any compensation under his contract for information which he claims he furnished the auditor from which he placed upon the omitted duplicate on July 23d, 1900, personal property improperly omitted from taxation in the name of Cotton H. Allen for the years 1894, 1896, 1897, 1898 and 1899, because the information was obtained by the inquisitor from the inventory of Allen's estate filed by his administrator in the probate court of this county on May 11th, 1900. That the threatened misapplication on this account amounts to \$105.14.

From the testimony it appears that Allen died January 26th, 1900; that his administrator was appointed February 5th, 1900; that the inventory was filed May 11th, 1900; that omitted property, consisting of stocks, bonds and diamonds, was put on the duplicate by the auditor July 23d, 1900; that the inquisitor received his information as to the existence of said property from the inventory, but that the value of the holdings for the respective years was obtained from other sources; and that said omitted property was put on the duplicate through information furnished by the inquisitor.

It is urged by counsel for relator that the inquisitor is deprived of compensation on the omitted property in this instance for two reasons: (1). That the property should have been listed in the name of the administrator instead of the decedent, therefore bringing the question of compensation to the inquisitor within the exclusion provided by statute. (2). That the only information furnished by the inquisitor was obtained from the inventory. We shall examine these in the order stated. From the language used in Section 6044 as passed April 25th, 1890 (87 O. L., 297), there appears to have been no distinction made in regard to the manner in which omitted taxes on property of estates should be listed on the tax duplicate. And under the

provision of this law the *inquisitor* was excluded from any part of an increased tax on property of any estate shown or not shown by the inventory. It contained the language:

“Nor shall any compensation of any kind be allowed or paid to any such person by reason of the omission of any of the property of any such estate, or any of the property included in any such inventory from any tax return, nor for any services relating thereto, under, or by reason of any such contract.”

The Supreme Court in the case of *Gager v. Prout*, 48 O. S., 89, (decided in 1891), held that property omitted from the tax return of Mary Barney in her lifetime was properly listed after her death in the decedent's name.

April 20th, 1893 (90 O. L., 217), Section 6044 was amended, the proviso of which is as follows:

“That no percentage nor any part of any increased tax on the property of any such estate covered by any such inventory, and required by law to be listed in the name of the executor or administrator, shall be allowed or paid to any person or persons under any contract for securing for taxation or putting on the tax list or duplicate property improperly omitted or otherwise omitted or not listed or returned for taxation, nor shall any compensation of any kind be allowed or paid to any such person by reason of the omission of any of the property of any such estate or any of the property included in any such inventory so required by law to be listed by the executor or administrator from any tax return nor for any services relating thereto, under, or by reason of any such contract.”

This section so as aforesaid amended April 20th, 1893, continued in force unchanged until May 15th, 1902.

It is contended by counsel for defendants that the phrases “and required by law to be listed in the name of the executor or administrator,” and “so required by law to be listed by the executor or administrator,” in this amendment is but the legislative expression of the holding in the case of *Gager v. Prout*, *supra*, and established a distinction between property required to be listed in the name of the executor or administrator, and property which is to be listed in the name of the decedent.

It seems clear that the effect of the amendment continued to exclude the *inquisitor* from any part of the increased taxes

1905.]

State, ex rel, v. Gilfillan et al.

on property, shown or not shown by the inventory, which was required by law to be listed by the executor or administrator; but that it did not exclude the inquisitor from furnishing evidence relative to omitted property of such estate which is to be listed in the name of the decedent, or not required by law to be listed by the personal representative. Since the authority of the statute (Section 1343-1) authorizing the employment of the inquisitor to furnish the auditor the facts relative to omitted property is general in its terms, the prohibition of the inquisitor's compensation being limited by the amendment to property required by law to be listed by the executor or administrator, by implication opened the field to the inquisitor, subsequent to the passage of the amendment relative to omitted property which is to be listed in the name of the decedent.

Allen having died in January, 1900, and his administrator having been appointed in February of the same year, it would appear that personal property improperly omitted from taxation from 1894 to 1899 was properly listed in the name of the decedent.

But it is further contended that the only information furnished by the inquisitor was obtained from the inventory.

We have found that the inquisitor received his information of the existence of the property in question from the inventory; but that he obtained the information as to the time of the issue of the bonds and the period of holding of the property by Allen from other sources.

Would the presentation of the mere fact of the existence of the property to the auditor by the inventory make a case of his official duty to proceed with the correction of a former tax return? If so, then it can not be claimed that the inquisitor has furnished the auditor the evidence necessary to authorize him to subject to taxation such property improperly omitted because in such a case the law would have furnished it.

The consideration of this issue involves the question whether it is within the official duty of the auditor to search for omitted property.

Section 6044 of the Revised Statutes provides that the probate court shall, at the end of each month, deliver to the county

auditor a statement showing as to each inventory the aggregate value of each class of property, other than real, as shown by the inventories filed during that month for his use and the use of the proper board of equalization in the performance of their respective duties in relation to returns for taxation of personal property and the equalizing and correction of the same.

The duties of the auditor in relation to returns for taxation of personal property and the corrections of the same are provided for in Sections 2781, 2781a 2782. Under Section 2782 if the auditor shall have reason to believe or be informed that any person has given to the assessor a false statement of the personal property, or has omitted or made an erroneous return of any property subject by law to taxation, he shall proceed at any time before the final settlement with the treasurer *to correct* the return and to charge such persons on the duplicate with the proper amount of taxes. And to enable him to do that he is empowered to issue compulsory process and require the attendance of any person whom he may suppose has knowledge of the personal property in relation to such return.

"If he shall have reason to believe" or *"be informed"* that any person has given a false, evasive or erroneous return he *shall proceed to correct* the return and charge such person on the duplicate with the proper amount of taxes.

Under the statute it will hardly be doubted that it is the *right* of the auditor to *procure* information, on his own motion, as best he can concerning omitted property. But it may be said that the statute does not make it the *duty* of the auditor to *discover* or *hunt* for omitted property. He is not required to assume that the returns are false—the property may have been acquired since the last return. The statute charges him with no duty in respect thereto until *he shall have reason to believe* or *be informed* of such false, evasive or erroneous return.

I apprehend that to call for action as a matter of official duty on the part of the auditor, as a condition precedent, he *should have reason to believe* or *be informed*, from evidence of a substantial nature, that *omission* exists.

After receiving knowledge of the fact of such default on the part of the tax-payer or being apprised of it, the auditor

1905.]

State, ex rel, v. Gilfillan et al.

shall proceed to correct it and charge such person on the duplicate with the proper amount of taxes.

In the case of *City of Richmond v. Dickinson*, 155 Ind., 345, where a statute in reference to omitted property was under consideration containing the language, "Whenever the county auditor shall discover or receive credible information of, if he shall have reason to believe that any real or personal property has from any cause been omitted * * * he shall proceed to correct the tax duplicate," etc. It was held the duty of searching for omitted property was not imposed upon the tax officer.

An inventory may or may not give the auditor information of a false return of a decedent. I am unable to conclude in this instance that the presentation to the auditor through the inventory of the mere fact of the existence of certain bonds, stocks and diamonds was such information as made a showing of a false, evasive or erroneous return of decedent, Allen, and therefore a case for correction. And since we have found that the inquisitor was not excluded from furnishing evidence of omitted property to be listed in the name of the decedent, it was within his province to furnish evidence as to the time the property had been owned by Allen and as to the value for said respective years. And he is entitled under his contract to his compensation from the taxes on the omitted property so found by the auditor as that which Allen should have returned for said respective years.

7. Again issue is taken on the claim made in the petition that defendant, Gilfillan, is not entitled under his contract of December 26th, 1902, for information which he claims he furnished the auditor upon which the auditor placed upon the omitted duplicate personal property in the name of Cotton Allen's estate.

It is in evidence that Allen's administrator was appointed February 5th, 1900; that on January 26th, 1903, the appointment of Edwin R. Sharp, administrator de bonis non with the will annexed, was confirmed and inventory filed April 27th, 1903. This inventory revealed in the property classes of money and

stocks, property far in excess of any return of like classes in the tax list of former administrator, Denmead, so far as the record shows. This property was not embraced in the inventory of the estate of 1900, and was brought to the duplicate as omitted property after the second inventory was filed, and had not been returned for taxation by the personal representative for the three years named. And the inquisitor was in possession of an abstract of this second inventory.

On the 10th of May, 1902 (95 O. L., 546), Section 6044 was again amended, the proviso in respect to allowance of percentage under an inquisitor's contract being as follows:

"That no percentage nor any part of any increased tax on the property of any such estate covered by any such inventory for the years for which it is required by law to be listed in the name of the executor or administrator shall be allowed or paid to any person or persons under any contract for securing for taxation or putting on the tax list or duplicate property improperly or otherwise omitted or not listed or returned for taxation."

It will be observed that the prohibition of compensation to the inquisitor by reason of the omission of any of the property of any such estate so required by law to be listed by the administrator from any tax return, in the latter part of the section, was eliminated.

It is contended that this cut out from exemption from search, inquiry and inquisitor's percentage any property a prior inventory might omit and which an administrator might fail or neglect to return for taxation.

It is conceded that had the statute of April 20th, 1893 (90 O. L., 217, 218), remained in force down to the present time that the inquisitor would not be entitled to recover any percentage on this latter property so subjected to taxation. That the prohibition contained in the latter part of that act would have been conclusive against such claim or payment. But that the amendment of May 10th, 1902, applies to conditions which may have arisen while the act of April 20th, 1893, was still in force; that the claim of the inquisitor in this matter is one of remedy;

1905.]

State, ex rel, v. Gilfillan et al.

that the statute as last amended is retrospective as to it. (*Gager v. Prout*, 48 O. S., 89).

I incline to the view that the contention of counsel for defendants on this point is well taken. However, whatever the right of the inquisitor may be as to conditions of omitted property while the act of April 20th, 1893, was still in force, i. e., property a prior inventory might omit and which an administrator might fail or neglect to return for taxation (which is not here decided) I am of opinion that the inquisitor is not entitled to his percentage on the omitted property in question for the reason that the fact of a false or erroneous return was presented to or in the possession of the auditor by the information of the second inventory.

It is claimed by counsel for defendant that the auditor's duty arising on the filing of the inventory is *prospective* and has to do with the administrator and the inventoried estate and has no mandatory retrospective view which does not apply to all living tax-payers or tax dodgers.

But the duty of the auditor when information reaches him that a tax return needs correction arises in any case, and applies equally in all cases. When the necessary information is at hand his duty to ascertain the true amount of property which ought to have been returned for certain years arises. This is distinct from a case requiring search. His information as to the property of the estate covered by the second inventory and required by law to be listed in the name of the administrator, was not exhausted and did not become *no information* as to property which should have been listed by the former administrator or cease to be evidence as to it.

It was urged in the *Gager v. Prout* case, *supra*, that the inventory was not evidence to prove the existence of taxable property for previous years. But the court announced that "A certified copy of the inventory of the estate of a deceased person filed by his executor in the probate court is competent evidence to show omissions in the returns of the deceased and in the absence of anything to the contrary may warrant the auditor in making additions."

Such inventoried information then would not seem to be entirely prospective or simply look forward for tax purposes with respect to the duty of the auditor in such cases.

In the case in question the law furnished the auditor the information through the second information of the fact of omitted property. Allen had been dead three years. The fact of the omitted property appearing by the inventory in 1903, it must have been omitted for 1902, 1901 and 1900, and a case for proceeding to correct the return of the former administrator was made. The inquisitor can not be said to have furnished the information in this instance since the auditor by provision of law already had it, nor is he entitled to receive compensation for reproducing it. It can not be contemplated that the inquisitor may run a race with the probate court to see who shall deposit the information first.

8. On December 11th, 1903, the auditor entered upon the tax duplicate, in the names respectively of twelve insurance companies, taxes on account of personal property in the county improperly omitted from the duplicate for the years 1901, 1902, and 1903, the total taxes claimed being \$64,182.25. Issue is made that defendant, Gilfillan, performed no service and furnished no information whatever to the auditor by virtue of which the taxes of the property omitted by said insurance companies were placed on said duplicate; that it was the duty of the auditor to place said taxes upon the duplicate for said years during which said property was omitted to be returned by said companies without any services of defendant, Gilfillan; that said auditor had knowledge that said property was so omitted for taxation during each of said years.

In this list of companies, a number appear to have been listed for the first time in 1903. The controversy relates especially to seven companies, viz., The Scottish Union & National Insurance Company, The United States Fidelity & Guaranty Company, The Lion Fire Insurance Company, The Travelers Insurance Company, The Canada Life Insurance Company, The British American Insurance Company, and The Fidelity & Casualty Company, in the list which had maintained property in this county for a number of years prior thereto.

1905.]

State, ex rel, v. Gilfillan et al.

It appears in evidence that on November 9th, 1903, the inquisitor, Gilfillan, made an examination of the taxables of the said insurance companies and presented such information; that on December 11th, 1903, the auditor entered the property improperly omitted on the duplicate. The auditor testifies he had no information as to this matter from any other source. This important service of the inquisitor in this matter stands undisputed, and, further, that the entry was made upon the information furnished by him for the years 1901, 1902 and 1903.

Property of some of these companies set forth in the second cause of action had been put upon the omitted duplicate by auditor Halliday in 1900, and these entries were carried forward upon the duplicate by the present auditor. In April, 1902, the matters of the taxes being then in litigation in the federal courts, some question arose as to the proper manner of entry as to those companies' taxes, and as a precautionary measure charges were placed on the duplicate as to those companies in the name of Arthur I. Vorys, as trustee. This was a formal matter on the entries of Halliday and not the result of any additional information, and availed nothing.

It further appears that all of these companies except one after the action of Auditor Halliday either withdrew their securities or converted or changed the character of their securities—substituting in some cases non-taxable for taxable securities.

In view of all the evidence, my conclusion is that the claims of the relator that the inquisitor, in this instance, furnished no evidence to the auditor relative to the omitted property of said companies for said years and that the auditor had knowledge that said property was so omitted for said years, are not established. Neither am I able to conclude that the absence of a return of the property charged the auditor with knowledge that said companies had taxable property within the county or that a false or erroneous return had been made by the assessor.

The observations and holding hereinbefore made on the claim for added property covered by the first inventory in the Allen

matter are equally applicable to this claim for added property of the insurance companies. There is a distinct difference in such a situation in my judgment and that presented by the case of the second omitted lists of Allen property when the second inventory gave the auditor information of the existence of omitted property.

The auditor was not required to assume that the assessor's return was false. The evidence is that the auditor had no knowledge as to the omitted property of the insurance companies in question until November 9th, 1903, and that the source of his information at that time was the inquisitor. Under such circumstances it seems clear that the statutes did not make it the duty of the auditor to hunt for omitted property. It provides (Section 2782) that if the auditor *shall have reason to believe or be informed* that any person has given false return or that the assessor has not returned the full amount required to be listed or has made an erroneous return of any property subject to taxation, he shall proceed to correct the return of the assessor and charge such person on the duplicate with the proper amount of taxes on giving proper notice, etc.

If the statute shall receive a construction that the auditor shall assume all returns false or erroneous, and that he shall investigate and search in each case, then the requirements of him would be practically impossible and there would be no need or use for an inquisitor, boards of equalization or boards of review. Such a view would be inconsistent with the recognition such taxing agencies have received.

My conclusion upon this issue is that the inquisitor is entitled to compensation out of the money actually paid into the treasury as taxes on the property which was ascertained said insurance companies should have returned for said years.

I desire in this connection to acknowledge the assistance counsel have rendered the court through their able briefs on the questions involved. The case has been attended with some feeling and arousing of public interest against ferreting contracts; but we consider that the policy of the state with reference to statutes supporting such contracts rests with the Legislature

1905.]

Krickenberger v. Wilson, Mayor.

and not with the courts. And adopting in part the observation of Judge Smith in *Deckebach v. Hagerty, supra*, whatever may be said as to the contracts being imprudent on the part of the county, in so far as the percentage of the inquisitor is concerned, it must be conceded that as to the insurance matter involved the contracts have been of great value to the public.

My conclusion and finding is that defendant, Gilfillan, is not entitled to compensation for information claimed to have been furnished in October, 1903, relative to omitted personal property of the Allen estate; nor to percentage on the money derived from the tax-payer on the penalty added by law to omitted property which the auditor in any case finds the tax-payer should have returned. To this extent the said defendant is enjoined from presenting vouchers for such compensation; and defendant auditor from issuing, and Treasurer Bowland from paying any warrant on account of such compensation and entry may be drawn accordingly.

A. T. Seymour, F. C. Rector and M. E. Thrailkill, for plaintiff.

J. T. Holmes and Dyer, Williams & Stouffer, for defendants.

BRANNOCK LAW PETITION A PUBLIC DOCUMENT.

[Common Pleas Court of Darke County.]

KRICKENBERGER V. WILSON, MAYOR.

Decided, June 13, 1905.

Liquor Laws—Petition for an Election—Right of Electors to Inspect—Mandatory Injunction.

1. A petition under the Brannock Law (97 O. L., 87) for a residence district election in a municipal corporation, presented to and filed by the mayor of such corporation, is a public document and open to inspection by anyone who is a citizen, elector and petitioner in said local option district.
2. Mandatory injunction is an appropriate remedy to enforce such right of inspection.

ALLREAD, J.

The plaintiff seeks to compel the defendant, as mayor of the city of Greenville, Ohio, to permit him to inspect or take a copy of a certain petition under the Brannock Law, presented to and filed with said mayor. He avers that he is a signer of the petition, a resident and elector in the local option district, and that an election has been ordered and is now pending. That at the time of his signing the petition he offered his opinion of a defect in the boundaries of the district, and advised an amendment; that at a reasonable time and when the mayor was not engaged in any other official or private business he demanded an inspection of said document or permission to take a copy for the purpose of ascertaining whether said document had been amended, and for other lawful purposes. The defendant refused inspection, and, according to plaintiff's petition, stated that it would be permitted at no future time. He thereupon asks that an inspection and permission to take a copy be awarded to him by an order in the nature of a writ of mandamus or mandatory injunction and for all other proper relief. The cause is presented on demurrer to the petition. The questions briefly stated, are:

1. Is the plaintiff in his capacity as petitioner, citizen and elector of the local option district, entitled to an inspection of the petition after its being filed with the mayor?

2. And if so, what is his remedy for a denial of the right?

The plaintiff claims that a petition under the Brannock Law, when filed with the mayor, becomes a public document open to inspection to citizens and electors of the district affected, and particularly so as to a signer.

The Beal Law (Section 4364-20a) expressly provides that the petition there provided for shall be filed as a public document and preserved for reference and inspection. No such provision is found in the Brannock Law, and it is argued that the omission shows an intention of the Legislature not to require the document to be made public.

There is no general statute found in this state requiring all public records kept open for inspection.

1905.]

Krickenberger v. Wilson, Mayor.

In certain instances (notably the Beal Law petitions and records of births and deaths in the probate court), such express provision is found, but it does not follow that as to all other records no public inspection can be enforced.

The determination as to whether the Brannock Law petition is a public document must be concluded from the terms of the act in the light of settled judicial precedents.

It was the doctrine of the common law, firmly established, that a corporator, *i. e.*, a member of a municipal corporation, is entitled to an inspection of all public records and documents in the hands of its officers. The principle upon which the law was founded is that the officers are merely trustees, while the corporators are the real parties in interest, and as such have a right to inspect the proceedings of their trustees.

The common law in this respect has been adopted by the American states and enlarged to meet the conditions of popular government (*Wells v. Lewis, Auditor*, 12 O. D., 170; *Brown v. Knapp, Treasurer*, 54 Mich., 132; *Ferry v. Williams*, 41 N. J. L., 332; *Boylan v. Warren*, 39 Kansas, 301; *State, ex rel, v. King, Auditor*, 154 Ind., 621; *State, ex rel, v. Williams, Mayor*, 110 Tenn., 549; *Re William H. Caswell* [R. I.] 27 L. R. A., 82; *Gleaves v. Terry, Secretary*, 93 Virginia, 491 [34 L. R. A., 144]; *State, ex rel, v. Hoblitzelle*, 85 Missouri, 620; *Burton v. Tuite*, 78 Michigan, 363; *People v. Vail*, 2 Cowen, 623).

In the New Jersey case cited, the letters of recommendation upon which a liquor license was issued, was held to be a public document, and open to inspection to any citizen of the corporation.

In the case in 54 Michigan liquor bonds on file with the county treasurer were held to be public documents and subject to public inspection.

In the Virginia case (34 L. R. A.), the record of the electoral board relating to the appointment and removal of judges and registrars of election was held to be open to public inspection. A distinction was observed in this case between so much of their record and documents where secrecy was expressly enjoined and where it was not, holding the latter public.

In the Missouri case it was held that registration and poll lists are open to public inspection to any citizen.

In the case from Cowen, it was held that the petition of freeholders for a highway was a public document and open for inspection to any inhabitant of the town.

Dillon on Municipal Corporations, Section 848, says:

"In this country the records, books and by-laws of a municipal corporation are of a public nature and if such corporation should refuse to give inspection thereof to any persons having an interest therein, or perhaps for any purpose to any inhabitant of the corporation, whether he has any special interest or not, a writ of mandamus will lie to command the corporation to allow such inspection and copies to be taken under reasonable precautions to secure the original."

High on Extraordinary Legal Remedies, Section 330, is to the same effect.

It is claimed by counsel for the defendant that this document has no place in the public records or files of the office, but is solely for the information of the mayor, and as a basis for his ordering an election. But no such deduction can be fairly drawn from the terms of the act. The right to an election in the district depends upon the fact of forty per cent. of the qualified electors of the residence district having petitioned for the election. A petition implies that it is writing, and the act fairly construed requires the mayor upon receiving the petition to file it among the records and documents of his office. The term "file" has a popular and fixed signification when used in connection with a public office. It meant at common law a thread, string or wire on which writs and other exhibits in courts and offices were fastened or filed for safekeeping and for ready references (13 Am. & Eng. Ency. of Law, page 13).

In *Chapin v. Kingsbury*, 135 Mass., 580, it is said that a direction that a certain certificate "shall be filed in the clerk's office imports that it is to be placed permanently on the files of the clerk so that any person interested may refer to it."

It is claimed that public policy would be better subserved by holding the petition secret, but that is for the Legislature and not for the courts.

1905.]

Krackenberger v. Wilson, Mayor.

When a petition is presented to a public officer and made the basis of an election and is required to be filed, in the absence of an express provision to the contrary it is a public document.

It is also claimed that the plaintiff has no such an interest in this document as entitles him to apply to the courts for an order for its inspection.

On this subject the courts are divided. At common law a special interest was required to be shown.

High on Extraordinary Legal Remedies, Section 330, says it is essential that the relator show some special interest in the records which he desires to inspect.

Dillon on Municipal Corporations, Section 848, intimates that a municipal corporation has no right to refuse an inspection of its books to an inhabitant of the corporation when demanded for any purpose.

In the case of *State, ex rel, v. Hoblitzelle, supra*, it was stated with much force in a case where the inspection of election documents was sought that the fact of citizenship alone conferred the right to apply for the writ.

In *State, ex rel, v. King, Auditor, supra*, on page 626, the right of inspection of records relating to disbursements of funds was awarded to a citizen.

In the case of *Wells v. Lewis, Auditor, supra*, the right of inspection of financial exhibits and records was awarded not only to a taxpayer, but to a citizen whose purpose was for public discussion and to advance his candidacy for an office. To the same effect are *Ferry v. Williams, supra*; *Burton v. Tuite, supra*; *State, ex rel, v. Williams, supra*.

The petition avers that the petitioner desires to inspect the petition to ascertain whether it has been changed, and for other lawful purposes. At common law the purpose of the inspection was required to be shown. But while there is no statute extending or defining the common law right, yet the authorities justify the conclusion that the plaintiff has a right to inspect the petition, which is the basis of an election now pending: (1), Because he is a citizen and elector in the local option district; (2), Because he is a petitioner. A citizen and elector is interested in the cost of the election, in the fact that an election is pending,

and in its results. He has a vote; has the right of contest, or if some one else contests, he may defend the election. Upon all these subjects his right to be informed is important. The fact of his being a petitioner, in a qualified sense a party, gives emphasis to his right of inspection.

This brings us to the question of procedure. In most states *mandamus* is held to be an appropriate remedy when a public right is involved.

In our state, however, the writ of *mandamus* is only allowed against a public officer to command the performance of an act which the law specially enjoins as a duty resulting from an office trust or station (*Selby, Auditor, v. State, ex rel*, 63 O. S., 543; *State v. Smith*, 71 O. S., 13-38; 26 Am. & Eng. Ency. of Law, page 956).

The right must be clear and does not exist where there is a complete remedy at law or equity (*The Cincinnati Volksblatt Co. v. Hoffmeister*, 62 O. S., 189; *Fraternal Mystic Circle v. State*, 61 O. S., 628).

In the cases last cited it was held that the proper remedy for a member of a private corporation to obtain an inspection of the books and records is injunction and not *mandamus*.

The right of a member of a public corporation to an inspection of its records is founded upon the same principle, and these cases therefore establish the remedy to be mandatory injunction (26 Am. & Eng. Enc. of Law, page 956).

It is claimed that the inspection is to be employed for an unlawful or improper purpose or for mere idle curiosity, or at an improper time, and that the writ may be refused upon that ground. But this motive will not be presumed, and as it does not appear from the petition, such purpose, if claimed to exist, must be made out by answer.

The demurrer is overruled.

Edwin C. Wright and *O. R. Krickenberger*, for plaintiff.

S. V. Hartman, for defendant.

1905].

State, ex rel, v. Laylin, Secretary of State.

DEFENSE OF MALPRACTICE SUITS AGAINST PHYSICIANS.

[Common Pleas Court of Franklin County.]

THE STATE OF OHIO, EX REL PHYSICIANS DEFENSE CO., ETC., v.
LEWIS C. LAYLIN, SECRETARY OF STATE OF THE
STATE OF OHIO.

Decided, January 4, 1905.

Corporations—Inhibition of Section 3235—Relating to the Doing of a Professional Business—Defense of Physicians against Malpractice Suits—Is a Professional but not an Insurance Business—Interstate Comity—Does not Extend to Foreign Corporations Obnoxious to Ohio Laws.

1. The business of defending physicians against civil suits for malpractice, conducted on the plan proposed in the suit at bar, is not an insurance business, and a corporation organized for that purpose can not be refused a certificate by the secretary of state on that ground.
2. But such a business is clearly a professional business, and therefore falls within the inhibition of Section 3235 forbidding the carrying on of a professional business by a corporation.
3. The rule of comity between states does not require that a corporation organized under the laws of another state shall be admitted to business in this state when such a business is obnoxious to Ohio laws.

BIGGER, J.

This is an action in mandamus brought against the secretary of state by the relator, a corporation organized under the laws of the state of Indiana, by which it is sought to compel the secretary of state to issue to the plaintiff a certificate authorizing it to do business in the state of Ohio, in accordance with its charter, under and by virtue of the provisions of Section 148d, Revised Statutes. The case is submitted to the court upon a demurrer to the petition.

The relator, among other things, states that it is a foreign corporation organized under the laws of the state of Indiana. Its proposed business, as shown by its charter, a copy of which is attached to the petition and made part thereof, is to

State, ex rel, v. Laylin, Secretary of State. [Vol. III, N. S.]

aid and protect the medical profession in the practice of medicine and surgery by the defense of physicians and surgeons against civil prosecution for malpractice; by the sale of contracts to physicians and surgeons for a stated and agreed compensation, by which it undertakes and agrees to maintain and manage the defense of the holder of such contracts against any action brought against him for damages for alleged malpractice, in relation to or connected with services performed or which should have been performed within the time covered by the contract, by engaging attorneys and paying the expenses of such defense. The relator states further that it does not assume to pay any judgment for damages or costs or other judgment rendered against the contract holder, but only agrees to arrange and maintain the defense of the suit brought against the contract holder for malpractice up to the time judgment is rendered therein. A copy of the form of contract made between the company and its contract holders is attached to the petition and made part thereof.

The petitioner states that it has made application to the secretary of state for a certificate authorizing it to do business in this state and has tendered to him the required fee therefor, etc., in compliance with the requirements of the statute, but that the secretary of state refused to issue to the relator such certificate and still refuses to do so, and the relator therefore prays the court to issue an alternative writ of mandamus requiring the said Lewis C. Laylin, as Secretary of State, to show cause why a peremptory writ should not issue requiring him to issue a certificate to the relator authorizing it to transact the proposed business in the state of Ohio. A copy of the proposed agreement with the contract holders is attached to the petition and is as follows:

“In consideration of the written and printed application, which is hereby made a part of this contract, and the sum of ten dollars, receipt of which is hereby acknowledged, being the consideration of one year's defense, and the further payment of ten dollars annually in advance on the day of of each year during the life of this contract, the Physicians Defense Company (hereinafter known as company)

1905.]

State, ex rel, v. Laylin, Secretary of State.

hereby agrees to defend the legally qualified physician,
....., of the city of, county of,
state of, against all civil suits for damages for mal-
practice, based on professional services rendered by himself or
his agent during the term of this contract, at its own expense,
not exceeding twenty-five hundred dollars, in defense of any
one suit, nor exceeding in the aggregate five thousand dollars
in defense of suits based on services rendered by the holder
hereof, within one year from the date of this contract, or
within any one year for which this contract shall be renewed;
all in the manner and upon the condition herein below stated,
to-wit:

"Immediate notice by telegram must be given the company
at the home office at Fort Wayne, Ind., of any suit brought or
demand made; and the holder thereof shall immediately for-
ward the summons, or other process served, and the complaint
or petition filed; together with a full and complete history of
the case and services rendered.

"Upon receipt of notice from the holder hereof that a suit
has been commenced against him for damages for civil mal-
practice, the company will employ a local attorney in whose
selection the holder hereof shall have a voice, who, together
with the company's attorney, will defend the case without ex-
pense to the holder hereof.

"Such defense will be maintained until final judgment shall
have been obtained in favor of the holder hereof, or until all
remedies by appeal, writ of error or other legal proceedings
shall have been exhausted, or until the sum of twenty-five
hundred dollars shall have been expended in said defense;
provided said company shall not be under obligation to expend
more than five thousand dollars in the aggregate in the defense
of suits based on services rendered, by the holder hereof, dur-
ing the original one year term or any renewed one year term of
this contract.

"Said company does not obligate itself to pay or to assume
or to secure the payment of any judgment rendered against
the holder hereof in any suit defended by it.

"The company shall not compromise any suit or claim for
malpractice against the holder hereof. Nor shall the holder
hereof, after the company has entered upon the defense of any
such suit in behalf of the contract holder, compromise the same
without the consent of the company in writing first thereto
had, and by reimbursement of the company of its expenses
theretofore incurred."

There are some other conditions but not material to the decision of the questions presented by this submission.

It is the claim of the attorney-general in support of his demurrer that the relator is not entitled to a certificate under the provisions of Section 148*d*, first, because it proposes to do an insurance business of a kind not recognized by the laws of the state of Ohio; and, second, because the business proposed to be done by the relator under its charter is a professional business and that such business is expressly prohibited to corporations by the laws of this state.

The first question presented, therefore, is this: Does the relator propose to do an insurance business under the provisions of its charter and the form of contract attached to its petition? This question I am of opinion should be answered in the negative. There is, it seems to me, a distinction between an undertaking to afford protection against a threatened loss and an undertaking to indemnify against such loss after it has occurred. By the terms of its charter, the company is not authorized to indemnify a physician or surgeon in case a judgment is obtained against him in a suit for malpractice. By the terms of the contract made between the contract holder and relator it is expressly stipulated that the company will not indemnify against a judgment if one be obtained. The undertaking is only that the relator will in so far as the legal defense is concerned stand between the contract holder and loss resulting from claims for malpractice. It seems to me that there is a clear distinction between an undertaking to ward off any, so far as possible, threatened or apprehended injury and loss and one agreeing to indemnify for such loss after it has occurred, and that were such undertakings to be considered as insurance contracts that it would lead to absurd consequences. For example, one who becomes a passenger upon a railroad train renders himself liable to loss through personal injury resulting from transportation. By the purchase of a pullman car ticket he for a stated consideration obtains that which affords him a very considerable protection against liability to injury and consequent loss. It is not a contract of indemnity, however, in case of injury and consequent loss. In

1905.]

State, ex rel, v. Laylin, Secretary of State.

what respect does such a contract differ from the one in question here? One sued for malpractice may defend his own case and take the added risk on the principle that a man who defends his own case has a fool for a client; and because the converse of the proposition presents a still more palpable truth, the employment of an attorney to make a defense would undoubtedly be a measure of protection against threatened loss, but as it is not in any sense an undertaking to insure or indemnify against a judgment which is a threatened loss it does not seem to me to be a contract for insurance. I am of opinion, therefore, that the proposed business is not that of insurance.

The next question presented is: Does the relator propose, if admitted to do business in this state to do a professional business? And this question, I think, must be answered in the affirmative.

Section 3235 of Bates' Annotated Statutes provides corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves except for carrying on professional business. If this proposed business be not that of carrying on professional business, then it would be difficult it seems to me to conceive how a corporation can carry on a professional business. A corporation being an artificial person can act only through agents. The agents proposed to be employed here are lawyers, members of one of the learned professions. Counsel for the relator say that if this objection would apply to the relator, it would certainly apply to every corporation that attempts to employ attorneys and conduct law suits. But there is a wide difference between an attorney making a contract with a corporation to defend it when sued, and a contract by a corporation with an individual to furnish for him legal services. If that be not what is forbidden by the statute, then I confess I am unable to conceive of a case which would fall within the statutory inhibition. The contract is plainly a contract between a corporation on the one side and an individual on the other for the furnishing of professional services. While the contract provides that the contract holder is to be consulted about the employment of the legal counsel, it is

expressly provided that he is to be employed by the relator and paid by the relator. The corporation can do professional business in no other way than by employing professional persons to render the service and that is what is here proposed.

The rule of comity which admits corporations of sister states to do business in this state does not extend to such corporations as propose to do business prohibited by the statute in this state or obnoxious to the policy of our laws. For the reason that the business here proposed is obnoxious to the provisions of Section 3235, Revised Statutes, the secretary of state was warranted in refusing to issue the certificate authorizing it to do business in this state, and the demurrer to the petition must be sustained.

Nash, Lentz, Addison & Fritter, R. S. Taylor and C. M. Niezer, for the relator.

Wade H. Ellis and George H. Jones, for respondent.

RIGHTS OF A WIDOW IN HER HUSBAND'S ESTATE.

[Common Pleas Court of Greene County.]

MARY F. BULLOCK v. W. O. BULLOCK, EXECUTOR.

Decided, May, 1905.

Estates of Decedents—Advancements—Election of Widow—Indebtedness of Son Evidenced by Note Should be Included in Inventory, When—Land Ordered Sold by Testator and Proceeds Distributed—Distributees Acquire No Title to the Land—Rights of the Widow.

1. The operation of the statute regulating advancements can only apply where the decedent died intestate as to his property.
2. A testator who at his death holds a note against his son, and in his will directs that in case said note is not paid before his death, such son "shall be charged with and there shall be taken out of his share" the amount thereof, "said note" is an asset in the hands of his executor, and should be appraised and inventoried.
3. There is no provision of statute whereby a surviving wife may elect to take under the law.

1905.]

Bullock v. Bullock, Executor.

4. A widow's rights under the law are not superseded or abrogated by any provision made for her in the will of her deceased consort that required her to elect; they are vested rights which she must elect to waive, and accept other provisions made for her benefit in order to defeat her rights under the law.
5. A widow who does not elect to take the provisions made for her in the will of her deceased husband is entitled to dower in all the land of which her husband died seized, and is also entitled to participate and receive her distributive share out of the proceeds of all the lands which the will of her deceased husband directed to be sold and converted into money for distribution.
6. Where land is directed by a will to be sold and the proceeds distributed to certain persons, such persons acquire no title under the will by electing to take the land, nor can any such election be made to defeat the widow's right to her distributive share out of the proceeds of such land.

KYLE, J.

This cause comes into this court upon a petition in error from the probate court.

Mary F. Bullock, the plaintiff in error, filed her certain motion in the probate court to require the defendant in error, William O. Bullock, the duly appointed executor, to proceed to sell the real estate, as provided in item three of his will, and convert the same into money as directed. And at the same time the said plaintiff in error excepted to the inventory of the executor because there was not included therein a certain note of Elias M. Bullock to his father, William H. Bullock, for fifteen hundred (\$1,500) dollars. Such motion and exceptions were overruled.

The court below made a finding of facts—

“William H. Bullock, resident of Greene county, died December 2, 1904, the owner of real and other estate mentioned in his will and situated in said county. He left surviving him his widow, Mary F. Bullock, plaintiff in error, and six children; that on December 9th his last will was duly probated in the probate court, and W. O. Bullock was appointed executor; that an appraisement and inventory of his estate was made and filed, which did not contain the note referred to in the motion; that on the 9th day of December a citation was duly issued by the probate court to Mary F. Bullock, widow, and that on the

8th day of February Mary F. Bullock appeared in court and then and there elected, in writing, to take under the law and renounce the provisions made for her in said will."

The court below, in its conclusions of law, found first, "that said note was intended as an advancement to said Elias M. Bullock, and was rightfully and properly omitted from the appraisement and inventory and should not be appraised as an asset of said estate."

If the \$1,500 note of Elias M. Bullock was an advancement, then it should not appear upon the appraisement and inventory. If it was not an advancement it was an asset in the hands of the executor to be appraised and inventoried with the other property.

Where a decedent at his death holds a promissory note executed by one of his heirs at law, in order to establish a claim that the money for which such instrument was given was a gift to such heir at law by way of advancement or otherwise the evidence must be clear and convincing. An advancement is a gift to take effect immediately as the share, or part of the share, of the child in the estate of the father which the child would otherwise receive at his death intestate. It is a gift absolute to take effect at once. And, therefore, it was incumbent upon Elias M. Bullock to show that the money, represented by the \$1,500 note, was a gift to take effect at once.

The fact that a note was taken whereby Elias agreed and promised to pay the same back to his father implies that it was not an advancement.

Whether or not there was any evidence to show that this note did not represent the true contract, that instead of being a loan from William O. Bullock to his son Elias, it was, in fact, an absolute gift to take effect *in presenti* does not appear and there is no such finding in the finding of facts.

The fact that the note appears in the hands of the decedent at his death without any other evidence or finding contravening such note, showing that, in fact, it was an advancement, a court must find that it was not an advancement, but is an asset in the hands of the executor. It is also true that it was not a

1905.]

Bullock v. Bullock, Executor.

gift *inter vivos* because obligations were taken for the money; nor would it be a gift *causa mortis* for the note was held by the decedent until his death. The foregoing was given to show that such note was not an advancement under the facts shown. But the law is that the operation of the statute regulating advancements can only apply where the decedent died intestate as to his property.

The whole determination as to whether or not such note should or should not be appraised and inventoried depends upon the will.

Item four of the will provides—

“I have given, from time to time, my several children equal amounts of money. My son, Elias M., owes me \$1,500 in addition to money heretofore given him for which I hold his note dated October 15, 1901. It is my will that in case he does not pay said note before my death, then, in that case, he shall be charged and there shall be taken out of his share \$1,500, with interest from date of said note.”

There is certainly no cancellation of this note to Elias. It contradicts that it was ever made or intended as a gift to him. It declares his expectation of payment of that note from his son, and provides a manner of payment if it is not paid at the date of his death; or in effect bequeaths it to him as an asset of his estate.

So far as the will is concerned, if the statute regulating advancement applied, it contradicts every notion and principle of an advancement, and such note is, without doubt, an asset in the hands of the executor and should have been appraised and inventoried with the other property of said decedent.

The next question involved may be comprehended in the single question: Is Mary Bullock entitled to participate and receive any share in the land devised under item three beyond her dower interest?

After making a certain provision for his wife in lieu of her dower, year's allowance and as her full distributive share of his estate, the testator then proceeds to direct that—

“At my death the land on the south side of the New Jasper road of 115 acres, more or less, to be sold by my executor and

the proceeds and balance of personal estate to be equally divided among my six children, or if any are dead their share is to go to their children, if any, subject to the following conditions and charges and deductions:"

Mary F. Bullock, the wife, did not elect to take under the will. Stress has been laid upon the fact of the election of the widow to take under the law. I know of no provision of the statute whereby a surviving widow may elect to take under the law. In order to secure the provisions of a will made for her benefit the widow must elect to take under such will. To stand on her rights under the law she does not elect to take under the law, but fails or refuses to make any election. In other words, her rights under the law are not superseded or abrogated by any provisions made for her in the will of her deceased consort that requires her to elect, but they are a vested right which she must elect to waive and accept other provisions made for her benefit in order to defeat her rights under the law.

The widow declined to elect to take under the will, therefore as to her William H. Bullock died intestate. And as the surviving widow of William H. Bullock she is entitled to be endowed of the lands of her deceased consort and is entitled to one-half ($\frac{1}{2}$) of the first \$400, and to one-third ($\frac{1}{3}$) of the remainder of the personal property subject to distribution.

When William H. Bullock made his will he knew that under the law his wife, Mary F. Bullock, might accept such provisions as he might make, or might retain her rights under the law, and having declined to take under the will she stood in the relation to William H. Bullock's estate as if he had died intestate, which is exactly the same position the plaintiff stood in in *Hutchins v. Davis*. As to how or why Mary Bullock came to occupy such a position, so long as she was not unlawfully there, it should not impair or affect her rights in the estate of her deceased husband.

Mrs. Hutchins was not given an opportunity to make any election. Mrs. Bullock did not elect, and I do not see upon what principle in justice or equity a substantial or nominal provision for any surviving wife, which she did not accept could

1905.]

Bullock v. Bullock, Executor.

affect her relation to the estate of her deceased husband. And while stress is laid by counsel upon the fact of no election in the 68th Ohio State, yet the principles, in my judgment, in that case determine this one.

Since William H. Bullock chose to reduce the 115 acres to money in view of the fact that his wife had a right to refuse to elect to take under the will, and having done so, he must take the consequences even though it may, to some extent, defeat his intention.

As argued in that case it is of no consequence that he intended that his wife should accept the provision that he made for her. By directing this land to be sold he could not defeat her legal rights. By this act he made this land personal property in the hands of his executor for *distribution*, and the statute gives her one-third of the remainder of the personal property *subject to distribution*.

Whether or not he reduced his whole estate to personal property would make no difference as the wife would be entitled to receive her share of what was directed to come into the hands of the executor for distribution.

There is no doubt that the real and personal property under item three are to be blended together, for the language is: "Such land shall be sold by my executor and the proceeds and balance of personal estate equally divided among my six children," and this, under the 68th Ohio State, makes an absolute conversion of this land for all purposes into personal property, which should be distributed as personal property even if the special object intended by the testator should fail.

It is claimed that she would be claiming under the will, but applying the principle laid down in the 68th Ohio State: "The effects of a conversion extend to and may be claimed not only by those who claim under or through the will, but also by those who are not entitled directly from and under the testator." And undoubtedly Mrs. Bullock has the right to claim directly under and from her deceased husband her distributive share of the funds that may be created in the hands of the executor for distribution. And it has also been determined in the 68th Ohio

State that this plaintiff in error is entitled to her distributive share of the proceeds of the sale of this land made as directed in the will notwithstanding that she has already received therefrom her dower estate.

In the dissenting opinion of Judge Shauck the inference may be clearly drawn that it was held by the majority of the court that one may invoke the doctrine of conversion even though they claim against the will which makes the conversion.

The argument thus far has assumed that this land is sold and converted into money and comes into the hands of the executor for distribution. The language of the statute is that the wife is entitled to her distributive share in the personal property subject to distribution. If this property should never come into the hands of the executor, by the legatees under the will electing to take the land in lieu of the proceeds thereof, in such case would the surviving widow be entitled to participate? It has been settled that the legatees under a will, by all uniting in the request therefor, may avoid the sale and keep the premises instead. There is no finding of any such election in this case and probably it is not necessary to discuss it. But assuming that such question might arise the law is that where a will directs certain real estate to be sold and the proceeds equally divided among certain persons, such persons electing to take the land acquire no title to the real estate under the will, but such persons would acquire as of the right to personal property. The right to take the real estate in lieu of the proceeds could only be done by the persons who are entitled to receive the proceeds. And the direction by William Bullock to sell this farm and blend the proceeds with his personal property into one fund for distribution according to the purposes of his will makes an absolute conversion of such land for all purposes into personal property, which should be distributed as personal property.

If the proceeds of this land is to be distributed as personal property, Mary F. Bullock, as the surviving widow, independent of her dowry, would be entitled to receive one-third of the proceeds thereof, and this would be true regardless of the fact that the objects intended by the testator should fail.

1906.]

Rohrer, Administrator, v. Culbertson.

The foregoing seems to be the logical conclusions of the principles and doctrines laid down in the 68th O. S.

The only other question remaining, that has entered into my mind, is as to whether or not it is the proper procedure to file a motion in the probate court asking the court to require the executor to proceed to convert this land into money under the third item of the will, under Section 524, which provides and gives the probate court exclusive jurisdiction "to direct and control the conduct and settle the accounts of executors, administrators," etc. Or should those interested make an application for the removal of such executor for neglect of duty under Section 6017.

But as the probate court has assumed that it has such power it will not be controverted here by this court.

For the foregoing reasons, that the exception of the inventory should have been sustained and said note entered upon the inventory and appraisal, and that Mary F. Bullock is entitled to receive one-third of the proceeds of the real estate directed to be converted into money in addition to her dower interest, the proceedings of the probate court will be reversed and this cause remanded to such court for further proceedings.

M. J. Hartley, for plaintiff in error.

M. A. Broadstone and *T. L. Magruder*, for defendants in error.

BREACH OF DUTY TO EMPLOYE NOT GROWING OUT OF THE EMPLOYMENT.

[Common Pleas Court of Hamilton County.]

SAMUEL ROHRER, ADMINISTRATOR, v. J. C. CULBERTSON.

Decided, March, 1905.

Master and Servant—Servant a Minor—Sickness of Servant—Threat of Discharge with Fatal Consequences—Apprenticeship—Negligence.

The refusal of a master to permit his employe, a lad of fourteen years, who had become suddenly ill, to leave his work for medical as-

Rohrer, Administrator, v. Culbertson. [Vol. III, N. S.]

sistance except at the risk of discharge, is not a breach of duty growing out of the employment, which would make the master liable for so doing, unless a contract of apprenticeship exists.

PFLEGER, J.

Heard on demurrer to the petition.

The petition alleges that the plaintiff's intestate, a boy of fourteen years, was a press feeder in the employ of the defendant's printing establishment; that during said employment the lad became suddenly ill, was unable to continue his work and requested permission of the defendant's superintendent to leave his work and go home; that defendant's superintendent carelessly and negligently, under threats of discharge, failed to do so; that the boy continued at his work until he became physically exhausted, left for his home, and by reason of such "neglect and want of proper advice and medical attendance" he died on that same evening. Ten thousand dollars damages are claimed. The defendant filed a demurrer on the ground that the facts stated do not constitute a cause of action.

The Indiana courts seem to have held that while the service is not compulsory in the sense that an employe can not be compelled to work against his will, it can not close its eyes to the fact that the servant does not stand upon the same footing, and that the necessities of the struggle for existence tends strongly to deprive him of the theoretical independence and freedom of action; that the servant's primary duty is obedience, and that if, fearing discharge, he obeys an order of the master, and through the negligence of the master, the servant, although knowing the danger, is thereby injured, it is but meet that he should be recompensed (Bailey on Personal Injuries Relating to Master and Servant, Sections 884 and 885).

The courts of other states, including Ohio, have not gone so far, and the extreme in that respect has been to hold the master responsible where the employe reasonably relies upon the superior knowledge of the master or his promise to remedy patent defects, unless the danger is so manifest as to prevent a reasonably prudent man from encountering the risk (*Ib.*, Section 898).

The generally accepted doctrine in all the other states is, that the servant assumes the usual and ordinary risks incident to the employment in which he is engaged. "Fear of discharge by the employe if he does not obey the order of the master will not justify him in running a risk which is well known to him, and then if he is injured ask a recovery in damages from the master." "In the absence of restrictive contract provisions the master is at liberty to discharge the servant at any time; so likewise is the servant at liberty to abandon his service at will. The master has the right to demand other service from that which the servant has engaged. The latter may accept or decline at will. Declining, he may lose his employment; accepting, he assumes the risks attending the service, if he knows or has been properly warned of them. The servant is not under guardianship; he is a free man at liberty to make such contracts as he will. If through stress of circumstances he consents to the order of the master rather than be discharged from employment, it does not impose liability upon the master because of such demand, if he has otherwise performed the duty which the law imposes upon him with respect to the servant" (*Ib.*, Sections 880 and 880a, *Worlds v. Georgia Railroad Co.*, 99 Georgia, 283; *So. Kansas Railway Co. v. Moore*, 49 Kan., 616).

The rule of contributory negligence and the assumption of risks is, of course, not so stringent against persons not *sui juris*, and our Supreme Court has held minors who possess only such discretion and judgment as is given to and may be reasonably expected from children of their age and capacity, to compel employers to use due care to protect them and instruct them concerning any dangers (*Rolling Mill v. Corrigan*, 46 O. S., 283; *L. E. & W. Railway v. Mackey*, 53 O. S., 383).

Nor could any civil liability attach under the laws in this state against child labor. Sections 6986-1 and 2 provide for the punishment by penalty and imprisonment of any one who willfully causes or permits the life or limb of any child under sixteen years of age to be in danger, or its health to be injured *from and while actually engaged in such employment*.

In the case at bar it is evident that the negligent act complained of did not arise from or out of anything done in the

course of the employment of the boy by the master or his agent in the way of dangerous machinery or appliances, or an unhealthy or unfit place to work in. It is alleged that he became suddenly ill from some cause unknown, and asked permission to go home for the purpose of obtaining medical advice. This was refused him under a threat of discharge, and because he took the risk of becoming worse rather than be discharged, the lad remained longer than he should, and by reason of his own failure to so seek medical advice and not for any cause growing out of the nature of his employment he subsequently died. As was said heretofore the servant was a free agent to abandon the service at his will. He certainly could not have been misled into the belief that he was forced to endanger his life or health by merely remaining on duty. The only possible situation in which such a liability could accrue would be in the case of apprenticeship where the master is placed in *loco parentis*, having the care and maintenance of the infant, and like a father is compelled to support the infant in sickness and in health, and to provide him with proper medicines and medical aid (2d Eng. & Am. Ency. of Law, Vol. II, page 512).

If the superintendent of the defendant was guilty of the inhuman conduct alleged in the petition, this court may condemn it as heartless and brutal treatment, but it was not a breach of duty which he owed the deceased growing out of his employment, and it can not give the plaintiff the relief here demanded.

The demurrer is therefore sustained.

M. G. Heintz, for the demurrer.

John W. Wolfe, contra.

1905.]

Nicholson, on behalf of, v. Maile et al.

CAPACITY TO SUE.

[Common Pleas Court of Cuyahoga County.]

E. NICHOLSON, ON BEHALF OF THE VILLAGE OF LAKEWOOD, v.
C. R. MAILE ET AL.

Decided, February 8, 1905.

*Interest—Collected by Village Treasurer—On Village Deposits—Action
for Recovery of—Capacity to Sue—Question of, may be Raised by
Demurrer—But Must be Specially Assigned.*

1. Where one sues on behalf of a village to recover from the village treasurer interest paid to him by banks in which the village funds have been on deposit, the question of his capacity to sue can be raised by special demurrer.
2. In the absence of a statute specifically authorizing a private individual to sue on behalf of himself and the village for the recovery of funds alleged to belong to the village, he is without capacity to maintain the action, but it must be brought by council or whatever officer is charged with the duty of caring for the public funds or of bringing an action to protect them.

BEACOM, J.

The plaintiff says he is a tax-payer and resident of the village of Lakewood, and that he brings this action for the benefit of the village; that he demanded of the solicitor of said village, in writing, that said solicitor bring this action on behalf of the village, but that the solicitor refused; that the defendant, C. R. Maile, became treasurer of said village in the year 1899, and remained such for a period of about four years; that the defendants, Webb and William Maile, were sureties for said treasurer on his official bond; that large sums of money were paid to him as such treasurer, and were by him deposited in various banks, and that the treasurer received as interest on moneys so deposited in these banks large sums of money, and, in substance, that the said moneys belonged to the village and not to the treasurer, but that the treasurer has refused to turn this interest over to the rightful owner—that is, the village—but keeps said moneys himself, and refuses to make any accounting to the

Nicholson, on behalf of, v. Maile et al. [Vol. III, N. S.]

village therefor; that defendant, Rowe, is the mayor of Lakewood, and defendants, Webb, Southern, Andrews, Mueller and Edwards, the council thereof, and defendant, Sensel, the clerk, and Lewis Smith, the present treasurer; that, in November, 1904, the council passed a resolution, by the terms of which it undertook to accept from defendant, Maile, \$1,250 as full payment of all moneys then due to the village from said Maile as treasurer, and to release Maile and his bondsmen from any further payment to the village; that said resolution was adopted, approved by the mayor, and that the other officers, the clerk and treasurer, were about to carry into effect this resolution, and that the defendant, Maile, the former treasurer, has fraudulently concealed from the council and the village the fact that he has received large sums of money as interest for the deposit of the public money, and that the majority of the council are in collusion with him and desire to make this proposed settlement to aid him in retaining the said moneys fraudulently. Plaintiff prays that an accounting may be had in this court with the said former treasurer and with his bondsmen, and that the said treasurer and his bondsmen be required to pay all sums found due against them in that accounting, and that the mayor and members of the council, the present treasurer and the present clerk be all enjoined from carrying out the compromise provided for in said resolution which had passed the council. These are the substantial averments and state the gist of this action.

A portion of the defendants appear and demur. Defendant, William Maile, one of the bondsmen of the ex-treasurer, demurs "for that plaintiff has not legal capacity to maintain this action."

Three other defendants, the mayor, clerk and present treasurer, file a joint pleading, setting up two grounds of demurer:

First. That several causes of action are improperly joined.

Second. That separate causes of action against the several defendants are improperly joined.

We will consider these in their order:

First. That plaintiff has not legal capacity to maintain this action, as averred by defendant, William Maile. There has been

1905.]

Nicholson, on behalf of, v. Maile et al.

some discussion as to what questions are raised by that demurrer. I find on examination of the Ohio authorities there is no trouble in determining the scope of this demurrer.

In *Saxton v. Seiberling*, 48 O. S., 554, the matter to which I call attention being on page 559, this same question was raised in a different form, but the court indicates clearly what this demurrer raises. In that case it was claimed that the action under consideration should have been brought by the assignee of a bankrupt for the benefit of creditors. It was not brought by him, but was brought by the creditors themselves. It is a case in spirit similar to the present one, being brought by persons who were really the parties in interest on the claim that their representative, the assignee, was not properly taking care of their interests and had refused to bring an action when it should have been brought. Nothing was filed in that case but a general demurrer, yet the proposition was argued that the assignee should bring the suit and not the creditor, and the court said:

“The second point is, that no one but the assignee can maintain the action. This is but another form of urging the want of capacity to sue and might be disposed of by saying, it is not embraced by the demurrer of the defendant. [That demurrer was a general demurrer.] Want of capacity to sue is a special ground of demurrer, and to be raised in that way should be specially assigned. When want of capacity is relied on by defendant as an objection to the maintenance of the action by plaintiff, it should be made by demurrer or answer, and when taken by demurrer it should be specially assigned.”

That is substantially this case so far as that question is concerned. The court said that if defendant desired to raise the question as to whether or not the creditors had a right to sue in their own names or must be represented by the assignee coming in for them, the way to reach that question was by special demurrer alleging that the creditor had not capacity to sue. And so, I take it, in the light of that case, this demurrer raises the question as to whether or not Nicholson could come in here speaking for himself and the village, or must he be represented by the council, or by whatever public officials are charged with

Nicholson, on behalf of, v. Maile et al. [Vol. III, N. S.]

the duty of caring for the public funds and bringing an action to protect them. Therefore I think the question is plainly raised by this special demurrer, can Nicholson come in here as plaintiff in a suit of this kind, whatever may be the merits of the case?

This is taken for granted in 4 C. C., 268, *State of Ohio, by Schwartz, Prosecuting Attorney of Hamilton County, v. John Zumstein et al*, in which two suits were brought by the prosecuting attorney of Hamilton county to recover moneys improperly paid, and two suits of the same character and for the same purpose were brought by a tax-payer, and the court said the question before the court was whether or not the prosecuting attorney or a tax-payer could bring a suit which, it was claimed, should be brought by the county commissioners. So I take the question raised by this special demurrer is not to simply reach a case of insanity or some disability of that character, but that its scope is broad enough to raise the question of the right of this petitioner, Nicholson, to bring this action.

Passing to the substance of the question, does plaintiff have capacity to bring this action? This case seems to be decided by the case last referred to, *State of Ohio, ex rel Schwartz, v. John Zumstein et al*, decided by the Circuit Court of Hamilton County. The court expressly passed upon the question raised here. The facts in that case were, substantially, that suit was brought against three members of the board of control who had voted for the allowance of a bill which had been presented by two persons, who were or had been members of said board, for expenses claimed to have been incurred by them while members, and against the county auditor, who drew a warrant on the treasurer, and against the person who had received payment thereof from the treasurer. The petitions allege that such allowance, drawing the warrant, and the reception of the money were illegal and unauthorized; that no such expense had been incurred, as the members well knew. It was a suit by a tax-payer against the officials who had authorized the payment of the money and the person who had received the money, and the averments were substantially as in this case that the transac-

1905.]

Nicholson, on behalf of, v. Maile et al.

tion was fraudulent. It was charged that no such expense had ever been incurred, and that the officials and the persons who received the money very well knew that they had never been incurred. That was an averment of fraud as strong as language could make it. Two of these suits were brought by the prosecuting attorney, and two others were brought by a tax-payer who averred that he had demanded of the county commissioners in writing that they bring the action, but that they had failed and refused to do so. That makes the case parallel to this present one, and here is what the court say:

“There can be no question but that the board of county commissioners, the financial representatives of the county, is the body having the right to sue for and recover all sums of money due to the county, unless the statutes of the state specifically in certain cases impose that duty upon or give that right to some other officer or person—and no other person or officer is authorized to sue for or recover any such money demanded unless the right to do so is conferred by statute.”

If that case is correctly decided, this court is of opinion that the facts in the present case are the same in law as in that case and that the ruling there would cover this case. It is there said that unless the statute imposes the duty of bringing the suit or grants the power to bring the suit to some person other than the public officers, no other person has power to sue for the money. Demurrer, for that plaintiff has not legal capacity to maintain this action, sustained. It is unnecessary to pass on the other demurrers at this time. Plaintiff excepts.

W. O. Mathews, for plaintiff.

Higley & Maurer, for defendants.

ATTACHMENT OF MONEY ON DEPOSIT.

[Common Pleas Court of Franklin County.]

THE BERGIN & BRADY COMPANY V. FRAAS, CLERK.

Decided, January 4, 1905.

Attachment—Money Deposited in Lieu of Bail—Not Subject to Attachment, When—Attaching Creditor in No Better Position than the Debtor—Bad Answer Good Enough for a Bad Petition—Pleading.

1. Where money voluntarily placed on deposit as bail under a charge in the police court, is attached for debt, the petition is defective if it fails to allege that the defendant was the debtor of the plaintiff at the time the money was deposited, or that the deposit was made in fraud of creditors.
2. An attaching creditor stands in no better position with reference to the fund attached than does his debtor, and where on the day the attachment was levied the debtor was not in a position to enforce a repayment of the money, the attaching creditor does not obtain a valid lien by the attachment.

BIGGER, J.

This action is brought to recover money paid into the hands of the police clerk of the city voluntarily by one under arrest, and at his own request accepted instead of bond.

The plaintiff after the deposit brought an action against the party arrested before a justice of the peace and had an attachment issued and served upon the police clerk who had custody of the money on the day before that set for the trial, and upon the day set for trial the party failed to appear and his bond was declared forfeited. It is alleged that before the justice the plaintiff had judgment in his favor and that the defendant answered admitting his possession of the money, and that he was ordered by the justice to pay it into court, but has failed and refused to do so, and this action is brought to obtain a judgment against the garnishee for the amount of the claim.

The question here presented is one of some difficulty. There are two decisions in this state by the Supreme Court upon the question of the right to receive money in lieu of bond, the holding being that money can not be received in lieu of bond,

1905.]

Bergin & Brady Co. v. Fraas, Clerk.

but the mere fact that the receipt of money in lieu of bond is not authorized does not seem to be decisive of the question.

The third branch of the syllabus in the case of the *City of Columbus v. Dunnick*, 41 O. S., 602, is:

“D having failed to show that S was his debtor at the time of the deposit, and that it was made in fraud of any creditor, the trial court should have rendered judgment for the city.”

Now the petition in this case does not allege that the party arrested was the debtor of the plaintiff at the time the money was deposited, nor that it was in fraud of any creditor. Upon this decision, therefore, it would seem that the plaintiff's petition does not state a cause of action. If that be true the answer to which a demurrer is filed would be sufficient on the principle that a bad answer is good enough for a bad petition. But beyond that I think it is true that an attaching creditor stands in no better position than his debtor. This was expressly decided in the case of *Sheldon v. Simons*, Wright's Reports, 724. Such also seems to be the effect of the decision in the case of *Carty v. Fenstermaker*, 14 Ohio State, 457, and *Morgan v. Spangler*, 14 Ohio State, 102.

Now this levy was made on the day before that set for trial. The party arrested had not yet made default; but was this his property within the meaning of the statute governing attachments?

The statute (6489) gives the creditor a right to attachment against any property of the defendant in a civil action under conditions therein provided. Section 6498 gives a right to garnishment against any person having property of the defendant in his hands. Section 6500 provides for the answer of the garnishee and he is required to answer touching the property of every description of the defendant and credits of the defendant. The next section provides he may pay the money owing to the defendant into court, etc.

The question is, Was this money at the time when this attachment was levied the property of the defendant so as to be liable to attachment at the suit of a creditor? It would seem that unless the rights of a creditor are higher and better

than the debtor in this case attachment would not lie. Undoubtedly on the day when this attachment was levied the defendant was not in position to enforce the repayment of this money. No court would have ordered it paid him except upon certain conditions, and he could not have obtained it without first complying with those conditions. That is he would have to submit himself to the jurisdiction of the police court and give a proper bond before he could obtain this money. No court would listen to his claim until he had done that. Unless, therefore, the attaching creditor stands in somewhat better position than the debtor who deposited the money, it would see that the attaching creditor could not obtain it without also complying with those conditions. It does not seem to me that an attaching creditor can obtain a valid lien by attachment upon money which was not due to the debtor. This is not an action to have a conveyance of property set aside in fraud of creditors. In such case the action would have to be for the common benefit of all the creditors.

The Circuit Court of Wood County decided in *Bryant v. Johnson*, 12 Circuit Court, 102, that attachment would not lie against property conveyed by an insolvent to preferred creditors.

True, the statute gives a right of attachment against money not yet due under certain conditions. But I am of opinion that a creditor can not by attachment reach money not either now due or to become due to the debtor without any further act upon the debtor's part except lapse of time. In this case the party under arrest voluntarily paid this money over to the city. There is no claim in the petition that this was either actually or constructively done in fraud of creditors' rights. Having voluntarily parted with it under such circumstances, I do not see how a creditor of his can reach it by attachment. For these reasons I am of opinion that the demurrer to the answer should be overruled.

Caren & Snow, for plaintiff.

Butler & Carter, for defendant.

1905.]

Hickey, Administrator, v. Conine et al.

**RIGHTS OF WIDOW IN MORTGAGED REAL ESTATE
OF HUSBAND.**

[Common Pleas Court of Allen County.]

R. F. HICKEY, ADMINISTRATOR, v. MARY F. CONINE ET AL.*

Decided, November 5, 1903.

Widow—Dower Interest of Computed, How—Where there are Mortgage Incumbrances—And Proceeds of Sale exceed the Mortgages—Widow not Subrogated, When—To Mortgage Lien Discharged in Part with Her Separate Means.

1. Where real estate is sold by the personal representative of a decedent, to pay the debts of decedent, which real estate is incumbered by a purchase money mortgage given by the decedent in his lifetime, and by a purchase money mortgage assumed by the decedent as a part of the purchase price of the land, and such land is sold for a sum more than the amount of both of said mortgages, the widow is entitled to have her dower interest in said land computed from and based on the entire proceeds of the sale, payable out of the residue of the proceeds, after satisfying said mortgages.
2. Where a widow furnished her husband money which was used by him in part payment of a purchase money note, executed by the husband secured by mortgage on real estate owned by him, which note and mortgage were not signed by the widow, in a proceeding brought by the personal representatives of the husband to sell said land the widow can not be subrogated to the lien and security of the mortgage indebtedness in so far as the money so advanced by her may have been used in paying said mortgage, in the absence of evidence that the widow gave or loaned the money to her husband, intending or expecting it to be paid on the mortgage debt.

CUNNINGHAM, J.

Heard on appeal.

The court does not find it necessary to enter into a precise statement of the case and the questions before it heretofore argued, as all those apparently interested are fully acquainted with the facts.

* Affirmed by the Circuit Court, 6 C. C.—N. S., 321, and by the Supreme Court without report, February 3, 1905 (71 O. S., 548).

The first proposition that the court is compelled to pass upon is this: Where a decedent dies, leaving his lands subject to a mortgage given to secure a part of the purchase money for said lands, is the wife dowable, where there is a surplus on the sale of the lands left after paying such purchase money mortgage, in the entire proceeds of the sale or in such surplus, being the equity of redemption? Now that is the sole proposition in this branch of this case, as it is admitted by counsel on both sides, that if the mortgage had been given, not for purchase money but for borrowed money, borrowed by the husband and in which the wife had released her dower to secure the loan, dower would be calculated on the entire proceeds if there was a surplus left; in other words, if the mortgage had not exhausted the land, she would be entitled to receive, if there was sufficient surplus after the sale, the value of her dower calculated in the entire proceeds of the sale of the land.

This proposition has been hinted at, but, so far as I can find, never decided by our Supreme Court, except in the 27th O. S., 464, in the case of *Culver v. The Executors of Harper*, and in the same volume at page 512 in the case of *Fox et al v. Pratt*; the last case relying upon the former, and the case of *The State Bank v. Hinton*, in the 21st O. St., 509. In this last case it seems that the purchase money mortgage was greater than the value of the land and that the land was sold for a sum insufficient to pay that mortgage. The reasonings and the discussions of the Supreme Court in all these cases puts this court in great perplexity as to what will probably be the holdings by the Supreme Court upon the questions raised in this case. Apparently the courts in the cases above cited, as well as all of the cases passing upon this subject, where the mortgage under consideration was not a purchase money mortgage, seem to draw a distinction between the widow's standing as against a purchase money mortgage and with respect to a mortgage given to secure the husband's debt, but I think in reality do not so distinguish. I have examined all these cases and undertake to start at the root of this proposition and see to what result these distinctions and reasonings of the Supreme Court will lead.

1905.]

Hickey, Administrator, v. Conine et al.

Judge Moore, in his brief, in sustaining his position that this calculation of dower should be made only in the surplus, makes this proposition:

"That the purchaser of real estate holds the title in trust for the vendor for the security and payment of the purchase price, whether such purchase price is relied upon to be secured by the vendor's lien or the mortgage of the purchaser, and no inchoate right of dower attaches to the unpaid purchase price. If it did attach, then it would be necessary that the wife join in the execution of the mortgage. The wife, having no interest or right, of course she has nothing to release; and only in the excess of the proceeds of sale, or, in other words, in the residue of the real estate beyond what would pay the mortgage, would she be endowed."

Now is that a correct statement of the law with respect to the wife's interest in that land? Undertaking to rely upon the Supreme Court, I think it is not. Under several decisions in Ohio it is unnecessary for the wife to sign a purchase money mortgage. And why? Because a vendor's lien is better, under the law, than the claim of a doweress; and, as was well put in argument by Judge Handy, a purchase money mortgage is nothing but the written proof of the vendor's lien. So that the lack of any necessity for her to sign is based, not upon the proposition that she acquires no interest in the land, but that the right of the vendor, as such, is higher than the wife's as a doweress.

In *Welch v. Buckins et al*, 9 O. St., 331, the rule is laid down by Judge Sutliff in these words:

"Where the husband purchases land, takes a conveyance, and mortgages the same back to secure the purchase money, the claim under the mortgage is superior to the claim of the widow for dower."

Now that is undoubtedly the law, but it is not based upon the theory that no dower vests in the wife when the lands are conveyed to the husband, but upon the proposition, and the righteous one, that the lien of the vendor is higher than a wife who has put nothing in the property. I therefore say, that when this land was conveyed to Taylor Conine, that immedi-

ately the inchoate right to dower therein vested in his wife, but that it was subject and inferior to the liens for purchase money held thereon.

In case of *Kling v. Ballentine*, 40 O. St., 391, and which has not been disturbed by later decisions, the rule as to the title taken or held by a purchaser does not agree with the proposition of Judge Moore that I have quoted above; but upon the authority of the 2d Ohio, 223, the court, in *Kling v. Ballentine* say:

“In Ohio the legal estate is in the mortgagor until condition is broken, and after that—that is, after the condition is broken—it, that is the legal estate, is still in the mortgagor as to all the world except the mortgagee.”

Therefore, I conclude that as against all the world, except these purchase money mortgages, this woman was entitled to dower in these premises so covered by the purchase money mortgage given or assumed by Taylor Conine.

Suppose, by way of argument, that Taylor Conine had left a policy of insurance payable to his estate or his executor, so that the avails thereof would have been money in his hands subject to the demands against that estate; that it would have been in the sum of twenty thousand dollars and that money had gone into the hands of this administrator. Had that been true the administrator would have had personalty in his hands sufficient to pay the claims against this land for purchase money, because, although secured by mortgage on the lands, they are demands against the deceased to which the administrator would have to apply, before he sells the lands, the money in his hands applicable to such purchase. And suppose he had, as was his duty, discharged the sums represented by these mortgages, out of that money; there then would have been no purchase money claims against this land, and would not this widow have been entitled to have assigned to her, in all that land, as against the world, her statutory dower therein? There can be no question as to this proposition.

Accepting this proposition then as true, could it be said that the administrator, by the making of those payments, have

1905.]

Hickey, Administrator, v. Conine et al.

created in her an interest of dower that she did not have before? Certainly an estate of dower could not be created that way. That, therefore, argues the proposition that the only thing standing between the widow's claim of dower and its assignment was these mortgages. In all of the decisions where the mortgages were given for sums that have not been for purchase money of the lands, but where the wife had signed the mortgage as the surety, practically, of her husband, creating thereby a claim against the land for the debt of the husband, the courts hold that after the mortgage has been discharged out of the proceeds of a judicial sale, that the wife is endowable in the entire proceeds, if a surplus remains after the mortgage is satisfied—they so hold because of the proposition that they say she pledged her dower interest in that land as the surety of her husband and that, as she did not pledge that dower interest to anybody except the mortgagee, she is entitled to her dower as her own separate property as against everybody in the world, except those to whom she pledged it. Very well; that being the theory, let us see how it works with a purchase money mortgage. Where the husband bought land and executed a mortgage to secure the purchase money, that was to secure his debt, not hers. No claim exists against her for the payment of that purchase money. Her interest in the transaction is founded simply upon her marriage contract—a present, if you will, that the statute gives her out of her husband's property, and that all the world has notice of. Now to secure his debt he executes a mortgage, and that debt which he owes being a higher claim and superior to the wife's statutory dower, she is not obliged to sign the mortgage. That mortgage is given in no way to secure any debt of hers; therefore she stands in no different position with respect to that purchase money mortgage than she does to any other mortgage that she has not signed, where it is not given to secure her debt. She is simply situated so that she can have no right to assert her dower against the mortgagees in either case.

The emphasis that the courts put on the statement that where she executes the mortgage to secure *his* debt, simply means to

distinguish it from a mortgage that might be given by the parties to secure her debt; and I do not deem it necessary to further carry out this reasoning. I can see no difference in the standing of this wife towards this land and her interest therein, as the case stands, on a purchase money mortgage, than if she had joined in the mortgage to secure money borrowed by her husband, and that, to the extent of the surplus arising out of the sale, after the payment of the purchase money mortgage, she shall be paid her dower calculated upon the entire proceeds of the sale.

Now before finally leaving this branch of this case, I want to say that this case of *Culver v. Harper's Executor*, that was followed in *Fox v. Pratt*, the court's reasoning seems to me to be peculiar, although at that time all of the rulings on this subject were different than now. The court states as a reason for their holding in that case, the mortgage therein being a purchase money mortgage, on page 468, that it would be the height of wrong that a wife should have dower as against the purchase money mortgage. We all agree with that proposition; yet in that case it appears that there was a surplus of enough to pay this widow the full value of her dower after having fully paid the mortgage debt. So that I can not see what the court meant by that argument, as it did not apply in the case being considered, and I think the court simply followed the general rule as it then stood.

The cases cited by Judge Handy to the court in his brief, 32 O. St., 210, and 33 O. St., 198, do not aid the court in this inquiry, except that the latter case again holds that the right of the vendor's lienholder, that is to say, the mortgage for purchase money, is superior to that of the mortgagor's wife; and the former case, while endowing the wife only in the surplus, there the mortgages, so far as appears, were not for purchase money, and the endowment was made under the old rule now unquestionably changed by the holding of the Supreme Court in the 46th O. St.

The defendant, Mary F. Conine, in the second cause of action of her answer claims in substance that she loaned her

1905.]

Hickey, Administrator, v. Conine et al.

husband \$2,200, which by agreement with her husband he was to apply on and said money was to be used in taking up \$2,200 of a mortgage indebtedness, a lien against the property sought to be sold by the administrator, said widow further claiming that under said agreement, she was to hold the note upon which said \$2,200 was applied and that part of the mortgage securing said debt. In this case she maintains that she is entitled to that extent to be subrogated to said mortgage lien. The widow was neither a party to said mortgage, nor obligated on the indebtedness secured thereby.

On the trial of the case there was no evidence that she gave or loaned the money to her husband upon the express understanding that it was to be paid on said mortgage indebtedness, or on any particular indebtedness of the husband, and for this reason I do not consider that she is entitled to be subrogated to the rights of the mortgagee under said mortgage securing the note upon which the payment was made.

Watts & Moore, Handy & Underferth and Bailey & Bailey,
for administrator.

Cable & Parmenter, for Mary F. Conine.

**OWNERSHIP OF PROPERTY PETITIONING FOR STREET
IMPROVEMENT.**

[Common Pleas Court of Franklin County.]

HERMAN ET AL V. THE CITY OF COLUMBUS.

Decided, January 13, 1905.

Street Improvements—Jurisdiction of Council to Order—Nature of Title in Petitioners—Necessary to Give Validity to Petition—Petitioner Must Own the Property at Time of Passage of Ordinance—Signature of Dowager Does Not—But of Owner of Life Estate Does—Bind the Property—Right of Purchaser to Defend Against Assessment—Benefits—Injury to Street from Heavy Traffic.

1. Under 90 O. L., 156, the jurisdiction of council to order a street improvement was based upon the petition therefor of one-half or more of the frontage.
2. To render a signature to the petition effective it must be that of the owner of the property at the time of the passage of the ordinance ordering the improvement.
3. Where an owner, who has signed the petition, conveys the property before the passage of the ordinance, and subsequently thereto receives the title back, he is precluded from resisting the assessment, but other owners who did not sign the petition are not bound by his signature.
4. The owner of an unassigned dower in real estate can not bind the property by her signature as against the tenants in common of the land.
5. But the owner of a life estate, who joins in a petition for the improvement of the street upon which the property is situated, binds the property for the payment of the assessment.
6. A grantee who purchased property after the lien of a street assessment had attached, and whose deed recites that he assumed to pay the street assessment as a part of the consideration for the land, can not defend against the assessment where his grantor might have successfully done so, and this is true where a subsequent deed, with a recital reserving to the grantee the right to contest the assessment, was executed as in this case.
7. A street assessment can not be successfully resisted on the ground of lack of benefits, where it appears that the holes which have appeared in the street since the improvement was made, and where it appears that the traffic thereon is too heavy for the character of improvement made.

1905.]

Herman et al v. City of Columbus.

EVANS, J.

This action is to enjoin the collection of assessments for the improvement of Hanford street, this city.

One of the questions, among others, is whether the city acquired jurisdiction to make the improvement in question. It is contended on the part of plaintiffs that the statute was not complied with, in that the owners of one-half the feet front of the real estate bounding or abutting upon said proposed improvement did not petition in writing the city council for said improvement.

Under the legislative act, under which the city council proceeded (90 O. L., 156), it was provided, among other things, that no improvement shall be made thereunder unless the owners of one-half of the feet front of the real estate bounding or abutting thereon petition the city council or board of public works therefor. It is imperative that this provision of the statute be complied with, otherwise the city had no authority to order the improvement.

No number less than one-half the feet front petitioned by the owners thereof could confer jurisdiction, and if, under the evidence, the contention of plaintiffs is maintained, those who did petition could not bind the owners of the abutting property who did not petition or participate in promoting the improvement.

It is claimed that Mrs. Schweitzer, who was counted as a petitioner for 603 feet, sold and conveyed her said property by deed on July 17, 1894, and that she did not own said property on April 29, 1895, when the ordinance for making the improvement was passed by the city council, nor when the resolution declaring the necessity for the improvement was passed by council on January 28, 1895.

It is also contended that Adaline Gall, one of the petitioners, as to 316 feet for which she signed, owned but a dower estate therein, which was not assigned or set off to her, and that her children by her first husband, who died intestate as to said real estate, were the owners of the same subject to the dower interest of their mother.

It is also claimed that Mrs. Moeller, a petitioner for 660 feet, owned but a life estate therein.

There is no doubt but that the evidence established the above facts as contended and the question is then one of law as to whether the said property should be counted as part of the feet frontage that goes to the majority petitioning for said improvement, or if it should not be counted, as contended for by the plaintiff. If said three petitioners were not the owners of said property in the sense contemplated by law, then they should not be counted, and in that event the city council had no jurisdiction to make said improvement for want of a sufficient petition and the action of counsel as to those who did not participate was void.

A determination of the question as to Mrs. Schweitzer's property is not without its difficulties, and I must admit that the trend of my independent convictions is not altogether in accord with my conclusions as to this question, as resolved from the weight of the authorities.

Mrs. Schweitzer owned the property at the time she signed the petition, or rather at the time she directed her son to sign it for her, which I find she did. She sold and conveyed the property to another some six months before the city council acted on the petition; hence at the time council acted on the petition Mr. Sims, her grantee, owned the fee in said property. I might say here that inasmuch as the court must under the rules of evidence determine from the record evidence the owner of said property, I can not find that Mr. Dresbach had any title or interest in said property, and I can not find that he was acting as agent for Mr. Sims, the grantee, at the time he induced Mrs. Schweitzer to sign the petition, notwithstanding that Mr. Dresbach testified, if I recollect correctly, that he was a joint owner with Sims, and was authorized to speak for him. I can not regard this evidence because of the rule that the records provide the best evidence on this subject, and, also, because of the further rule that the testimony alone of the agent can not establish the agency. Mr. Sims did not sign the petition, and I am unable to find that he either directed Mrs. Schweitzer to sign or in any

1905.]

Herman et al v. City of Columbus.

way ratified it or encouraged this improvement in any manner. He afterwards conveyed the property back to Mrs. Schweitzer, she coming into title again. No doubt her act in signing the petition would preclude her from resisting said assessments. But the question here is, would it be conclusive as to others? The weight of many authorities and the reasoning tend strongly to support the contention that the fact that she signed the petition when she was the owner of the property, and when it was filed with the council, would be sufficient to clothe council with jurisdiction, as to the feet frontage signed by her, and, as before stated, my reasoning is influenced by this view of the question. But I am confronted with the holding of the circuit court of this circuit in *Tone, ex rel, v. Columbus*, in 1 C. C. R., 305, in which this very question is met and decided. The question is fully made and decided in the above case. The contention of counsel for defendant that the facts in that case may not have called for such a holding can not avail, for the presumption would be that the question was made in the case. The court in the opinion expressly state that the question did arise out of the evidence, and say:

“Other questions arise out of the evidence, showing that according to the deed record, some of the petitioners conveyed away their property after signing the petition, but before the passage of the ordinance, and that others did not become owners of abutting property until after the passage of the ordinance. The act contemplated a petition signed by those who were owners of the property at the time of the passage of the ordinance. In view of the rule exempting the plaintiffs from offering plenary evidence, they were relieved of the burden incumbent on them when they showed from the public record that the petitioners in this class were not then the owners of abutting property, it then became the duty of the defendants, who asserted ownership contrary to the record, to establish it.”

Again the court say:

“They had no authority whatever to pass an ordinance authorizing the improvement, except on petition of two-thirds of the front feet abutting on the street. And before passing it they should have known to a certainty that the requisite number

had signed. None of the petitioners guaranteed by his signature, nor was he so required, that the requisite number was on the petition. Each signed for himself alone, and council should have ascertained that the aggregate signers comprised the owners of two-thirds of abutting property, before taking final action. Such being the duty of council, the property-holders might well have relied on their action as being in accordance with law."

Now, what gives additional force to the application of the Tone case (*supra*) to the case at bar, is that the language of the act under which the improvement was made in the Tone case as to the petitioning is substantially the same as in the act under which Hanford street was improved. Section 24 of the act (72 O. L., 157), provides—

"The city council shall not have the right to authorize any improvement under this act, unless the owners of two-thirds of the feet front of the property abutting upon any street or avenue to be improved in said city shall petition the city council for the privileges of this act."

It is, therefore, apparent that the court in the Tone case had the same question presented as we have here, and substantially the same language as to petitioning for the improvement, and held that the act contemplated a petition signed by those who were owners of the property at the time of the passage of the ordinance.

For this reason I reach the conclusion that the 603 feet of Mrs. Schweitzer should not have been counted.

As to the 316 feet signed by Mrs. Gall, I am of the opinion that under the rule laid down in *Cary v. Gaynor*, 22 O. S., 584, and *Campbell v. Park*, 32 O. S., 544, the owner of an unasigned dower in real estate could not bind the property by her signature as against the tenants in common of the land. The evidence is not sufficient to show that Mrs. Gall had authority to sign as the agent of her children who owned the fee in said premises subject only to her undivided dower interest. Council had no lawful authority to count said 316 feet in determining the number of feet front in the petition for the improvement.

As to the life estate of Mrs. Moeller, although it has been held in Maryland (64 Md., 10) that a life tenant can not bind

1905.]

Herman et al v. City of Columbus.

the property by joining in the petition, but in Ohio the holding of a perpetual lease can bind the property without the lessor joining, and this, notwithstanding the leasehold may be forfeited upon default of the lessee in the payment of the ground rent, on the ground that the assessments are levied upon the corpus of the real property, and not upon the titles by which the same may be held, when otherwise provided by law (60 O. St., 244).

I am inclined to the opinion that the signature of Mrs. Moeller to the petition would bind the property.

The 603 feet of Mrs. Schweitzer and the 316 feet of Mrs. Gall should not have been counted for the reasons above stated. Eliminating said number of feet in said two parcels from consideration in determining the number of feet front of owners of property abutting on said improvement reduces the number below one-half the feet front abutting thereon, and below the statutory number which would give the city council jurisdiction to order said improvement. This being so, the prayer of all the plaintiffs who did not sign the petition should be granted, unless it be that of Mr. Holden, and the question as to him I will now briefly consider.

Long after this improvement was made and after the assessment ordinance was passed Holden purchased the property in question from Schmidt. The deed recites that the grantee assumed and agreed to pay said street assessments as a part of the consideration for said premises.

Under the authorities cited, and which is but the enunciation of a well established rule of law, by reason of such an agreement Holden could not defend against payment of the assessment, notwithstanding his grantor Schmidt might have successfully done so if he had retained the premises.

But Holden contends that said agreement and assumption was inserted in said deed by mistake, and he offers in evidence a subsequently executed deed from said grantor which seeks to correct the former deed, and recites that it was the intention of said parties to reserve to said Holden to contest said assessments if the same were illegal or unjust, and to protect said grantee against payment of the same. This last deed was exe-

cutted some four years after the date of the original deed to said Holden.

It must be borne in mind that at the time of the execution and delivery of said original deed to Holden, said assessments had long before been made and the exact amount assessed against said property was a matter of record and was known by both parties to the transaction. The debt then existed against said vendor, and it was made a charge and lien against this property, so that it must be presumed that both parties knew at the time of the transaction between them that it was a lien on the property, and the exact amount assessed thereon. Besides Holden was present at the time the deed was delivered, and while he is not certain that he looked it over, yet he had an attorney to look it over for him. He says he knew he would have to pay whatever legal assessments were on the property, and that such was his intention when he made the deed, and that he would have to pay such in addition to the consideration paid to the grantor, and he considered the property worth the price paid to grantor in addition to the amount of the assessment.

In view of all the facts and circumstances surrounding the transaction, I am unable to dispose of the conviction that Mr. Holden and said grantor at the time of said conveyance considered said assessments as a part of the consideration, and that said deed expressed the agreement between them.

It would be a dangerous rule, unless the proof is clear, to permit parties to such a transaction to come in with a deed seeking to set aside such an agreement in a deed long after the transaction, and at a time when it is of no interest to the grantor whether or not the grantee shall pay the assessment, and when his only concern is that he himself will not have it to pay. The contract, especially if in writing, made at the time when the grantor sells the property, and when he is more vitally interested carries greater conviction, and especially so when the instrument is examined by an attorney for the grantee, which examination is presumed to be thorough and careful, and made with knowledge of all the terms and conditions of the transaction.

1905.]

Herman et al v. City of Columbus.

I am, therefore, of the opinion that Mr. Holden's defense is not well taken, and that he is liable for said 125 feet so assessed.

The only remaining question is that of benefits. I have examined carefully this question on the evidence adduced on the ground that those who signed the petition could defend on this ground notwithstanding they promoted the improvement by signing therefor. But I can not devote much time and space to a discussion of this question.

The evidence is quite conflicting as to the character of the work on this improvement. There is no doubt but that soon after the completion of the work and its acceptance by the city, that the street was cut up considerably, and especially towards the east end of the street there were many holes or depressions made in the pavement. One of the considerations here is, who was responsible for that. If the macadam roadway was constructed substantially in accordance with the plans and contract, and if it was completed and accepted by the city as work performed in accordance with the plans and contract, and the defects complained of were made subsequently thereto by reason of the ordinary hauling over the street, then I do not think that this feature could be taken into consideration in determining benefits. My opinion is that the weight of the evidence shows that this street was cut up and the holes made the following spring, and were caused from heavy hauling over the street of material for the Parsons avenue improvement. This is the testimony of some of the witnesses whose presence in that locality afforded them an opportunity to know these facts. Besides, the evidence shows that a macadam street is not adapted for heavy traffic, and that such will cut up such a pavement. It seems that Hanford street was one of the main thoroughfares from High street to Parsons avenue. This would necessarily attract to it the heavy traffic between said streets. The petitioners themselves should have known such by reason of their location on the street before it was determined what kind of an improvement would be made there.

It is not possible to restrict or limit the kind or character of traffic over a public street. The streets are open to the public

for all lawful traffic, and I am inclined to the opinion that the chief cause of the condition of this street soon after its completion was due to such heavy traffic about the following spring.

In view of all the evidence adduced *pro* and *con* on the question of benefits, I am of opinion that plaintiffs have not established satisfactory proof that the benefits were not equal to the cost of the improvement. But two witnesses for the plaintiff have testified positively on that subject, while several witnesses for the defendant have gone into detail on this question and testified that the benefits are in excess of the cost.

My opinion is that the weight of the evidence shows that those persons who signed the petition are not entitled to relief on this ground; and under the authorities, as they petitioned council for this improvement, they will be liable for the respective amounts assessed against their property for said improvement.

As to the assessable frontage of the Clara Moeffet property that she will be assessed the feet front petitioned for by her.

The decision is that said assessments are void as to such of the plaintiffs as did not sign the petition for said improvement, and the defendants are enjoined from collecting the same against any such plaintiffs, and their said property is released from any lien against the same by reason of such attempted assessments, and they may recover their costs herein. All relief prayed for by such plaintiffs as signed said petition and of Mr. Holden is refused, and the restraining order as to such plaintiffs is dissolved. Said last named plaintiffs and the defendants will each pay one-half the costs.

John Morrissey, H. J. Ossing and L. G. Addison, for plaintiff.
J. M. Butler, for defendant.

1905.]

Goodhue v. Goodhue.

UNDUE INFLUENCE OVER A SISTER.

[Superior Court of Cincinnati, Special Term.]

BLANCHE GOODHUE v. FRANK D. GOODHUE.

Decided, February, 1905.

Contract—By a Sister to Convey Property—Undue Influence in Securing—Family Agreements—Burden of Proof—That the Transaction was Righteous—Deed—Delivery of—Evidence—Fraud—Gifts.

1. In an action by a sister to set aside for want of consideration, fraud and breach of confidential relations, a paper writing wherein she agrees to convey certain property to her brother, the burden of proof is upon her brother to show that the transaction was fair and equitable, and was executed with full understanding.
2. Inasmuch as it must be assumed that the father of the parties intended to do just what he did do when, with deliberation and in legal form, he conveyed the property to the daughter, it follows that if the daughter was subsequently induced to sign an agreement to convey the property to her brother under representations that the conveyance to her was a departure from an understood family agreement as to the distribution to be made of their father's property, she was unduly influenced and the agreement should be set aside.
3. The mere handing by the grantor to the grantee of a deed properly executed does not constitute delivery thereof, in the sense that title is passed *eo instanti*, unless the grantee is in a position to legally accept delivery of the deed at the time it comes into his manual possession.

HOFFHEIMER, J.

The facts in this case are as follows:

On September 10, 1891, the plaintiff executed the following writing in favor of the defendant:

“CINCINNATI, OHIO, September 10, 1891.

“I promise to deed to my brother, Frank D. Goodhue, after the death of our father, all the property I own on West Sixth street, formerly called Lower River road, except the property now leased to Ellen Freeman.

“(Signed)

BLANCHE GOODHUE.

"The consideration of the above is one dollar and other considerations to me paid.

"(Signed)

BLANCHE GOODHUE."

On the reverse side, in defendant's handwriting, appears the following:

"This is to be of no force or effect provided I am not living.

"(Signed)

FRANK D. GOODHUE.

"September 14, 1891."

The property is fully described in the petition, and had been previously conveyed to plaintiff by the father of the parties. Plaintiff filed suit alleging said writing was a cloud on her title and she asked that said writing be declared a nullity, alleging want of consideration, fraud and breach of confidential relations; and she prays that her title be quieted.

Defendant denies confidential relations, undue influence and fraud, and claims that for many years prior to the conveyance of the property to plaintiff by her father *it had always been understood and agreed by the family* that the premises described in the petition should, on the distribution that it was understood was ultimately to take place, become the property of the defendant. After distribution, defendant alleges he discovered that the property in controversy had been given to plaintiff. He at once expressed "his objections to her and to her having the same, basing his objections upon the family agreement, claiming that said agreement had been violated, and at the same time, gave her to understand that he would go to his father and make the same remonstrance and objections against said conveyance, and would induce, or try to induce him to either require plaintiff to give up this property to this defendant, or in some other way to make good this loss." That in consideration of his forbearance to do so and for one dollar, plaintiff executed said writing. He prays for specific performance.

In a second additional cross-petition defendant claims that, by virtue of a deed of said property, executed and delivered February 12, 1878, by the father to defendant, to be recorded on the father's death, the legal title vested *eo instanti* in defendant, subject to the right of possession in the father for life; and that,

1905.]

Goodhue v. Goodhue.

independent of said writing, defendant is entitled to said property, and asks that his title be quieted.

Plaintiff denies the delivery of this deed, and also pleads the statute of limitations, in reply.

Under the view entertained by me of this case, although the plaintiff charges her brother with fraud, it is not necessary for her to establish *direct* fraud. It is incumbent on defendant to show that the transaction was fair and equitable, and that plaintiff, when she executed this paper, did so understandingly. I am fully satisfied, from the evidence, that the one dollar mentioned as a consideration was in fact never paid, nor was there any other consideration, for this alleged promise to convey real estate of concededly more or less value. No matter, then, for what purpose that paper was executed, whether, according to plaintiff, it was merely as a bit of possible evidence to be used by defendant, in the event of trouble over the will which, at his request, she had executed in his behalf at Rochbridge Alum Springs, devising this property to him; or whether, according to defendant, it was what it purports to be, an express promise to convey this real estate—it was gratuitous and founded on no consideration.

What rights, then, has the defendant acquired, by virtue of the paper of September 10, 1891? Lord Cottenham long ago declared that whenever a person obtained, by voluntary donation, a benefit from another, he was bound, if the transaction be questioned, to prove the transaction was righteous. And the rule is not confined to cases of attorney and client, parent and child, but is general. (See *Cooke v. Lamotte*, 15 Beav., 234; *Billage v. Southee*, 9 Hare, 534; *Haydock v. Haydock*, 34 N. J. Eq., 570, 574.) So that, notwithstanding the claim of the defendant that no confidential relations existed, because the relationship was merely that of brother and sister—a relationship not included in those special instances of confidential relations usually cited, namely, guardian and ward, trustee and *cestui que trust*, solicitor and client, parent and child—still Lord Cottenham considered that the rule extended to *every* case where a person obtained influence over another. The confidential rela-

tions being merely one of fact, must be established by a preponderance of the evidence in the particular case before the chancellor.

It is plain that plaintiff loved and trusted her brother implicitly. And it is also evident, that, through this love and trust, the scruples she manifested when requested to execute this paper ("She could not see the use of it"), were overcome, and her submission was easily effected. Her complete reliance and dependence on defendant, from the very inception of this transaction, at Rochbridge Alum Springs, down to its culmination, in the secrecy of the room at her home, together with all the attendant circumstances, point unerringly to the dominant and controlling position of an only and older brother, over a sister who had just come of age, and who had no experience in matters of the world.

What, then, is the rule to be applied to a case presenting these features? In the case already adverted to, a nephew who was provided for by his aunt's will, procured a *post-obit* bond from her. It was set aside on the ground that he had not proved that she knew the effect of the bond was to make the will irrevocable (*Cooke v. Lamotte*, 15 Beav., 234). In that case it was said:

"The court will not permit the transaction to stand, if the defendant received the advantage through influence he had over the plaintiff, unless he can show the transaction was a righteous one."

In a case involving a transaction between an attorney and client, Lord Eldon held that he who bargains in matters of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence, and he takes upon himself the whole proof that the thing was righteous (*Gibson v. Jeyes*, 6 Ves. Jr., 266). Indeed, so watchful is equity, in cases of donation, that the application of the rule is not even limited to cases involving confidential relations; and it is held that the relation is merely an incident to be considered with the other circumstances in the case. It may be regarded as an established rule in equity that where a person

1905.]

Goodhue v. Goodhue.

gains an important advantage over another by receiving a voluntary conveyance, or where the transaction indicates palpable improvidence on the part of the grantor, the person securing the benefit will be required to prove it was consistent with fair dealing; and in the absence of such evidence, it will be set aside (Beach, Trusts and Trustees, Par. 145, and cases cited). Such being the case, as announced in the beginning of this opinion, the burden is on the defendant to prove these things.

A brief discussion of but one or two phases of the evidence, we think, will suffice.

Defendant claims the transaction was fair and equitable, because, for a period of nearly thirteen years prior to the time of the execution of this paper, his father had intended to distribute his property among his children, and to give the Lower River road property, which included that in controversy, to defendant; that the giving of this property to plaintiff *was a departure from the understood family agreement*, and that, upon his protesting to plaintiff to that effect, she agreed to relinquish the property.

There is no doubt that the father of the parties had many times manifested intention of giving this property to defendant, by making wills and otherwise. But, certainly he had the right to change his mind; and that he did so, is evident. The very fact that he conveyed to his daughter shows most completely his change of purpose, and thus completely extinguished any basis of expectation on the part of the son. And it were manifestly unsafe to conjecture that the father intended doing anything different from that which he has deliberately and legally performed, and it would be unsafe to conjecture that he gave his daughter deeds to the property, when, in fact, he had never intended to. There was no charge of fraud or collusion against plaintiff in receiving this deed, and it is very significant that defendant made no complaint to his father, who at this time though of advanced years, was active and attending to his business affairs.

Now, if the defendant induced plaintiff to give him this property, on the ground that the father gave it to her in vio-

lation of a family agreement, she was unduly influenced to part with this property. First, because the proof fails to sustain the assertion that there existed at the time a family agreement; second, even if there was one, it implied no legal obligation on plaintiff's part. Manifestly, then, she was misinformed. And considering the relations existing between these parties at that time, we think the influence thus used was fatal.

The language of Sir Samuel Romilley, in his celebrated reply in *Huguenin v. Baseley*, 14 Ves. Jr., 273, may be adopted as expressing the view equity takes of a situation such as this. Speaking in regard to immoderate gifts, bearing no proportion to the circumstances of the giver, where the reason given is not true, and the giver a weak person liable to be imposed upon, a court of equity, if it sees any undue means have been used, or if it sees the least speck of imposition at the bottom, ought to interpose. In *Sears v. Shafer*, 1 Barb., 408, the court adopts these views, and adds that which is also pertinent: That the court will interpose if the donor is in such a situation with respect to the donee as may naturally give the latter an undue influence over the former, if there be the least *scintilla* of fraud. See also, authorities cited, *supra*.

It was also incumbent upon the defendant to prove that plaintiff acted knowingly. From what has already been said, even assuming the fact to be as defendant claims, she did not act knowingly. But, in addition plaintiff claims that defendant represented the property was unimproved and would be a burden to her. This the defendant denies. Independently of this claim of plaintiff, however, it was incumbent upon the defendant to show affirmatively that he acquainted her with the exact conditions of this property. She never saw the property; and he knew or ought to have known this fact. On the contrary, he was very familiar with it. His, therefore, was the superior knowledge, and yet, instead of offering satisfactory and positive evidence on this point, the defendant says, on direct examination: "I do not remember stating there were no improvements upon it." "I do not remember of saying the property would be a burden to her after father's death." (Page 4, record tes-

1905.]

Goodhue v. Goodhue.

timony of defendant.) "I may have said, the property was in bad repair." Now, if it were conceded that there was no *suggestio falsi*, there must be no *suppressio veri*; and we think it is fairly deducible from such evidence as the defendant himself offers, that he did not fully acquaint plaintiff with the status of the property.

Under the circumstances, was the transaction consistent with fair dealing? We think not. By this paper, plaintiff evidently promised to give defendant real estate of some value. Was it her intention to be liberal? This was not a case where the recipient needed the aid of the plaintiff; she did not offer to give him this property of her own volition. The fact of the matter is, that the donee (defendant), was the active party. The plaintiff was entirely passive. The defendant was the one who urged upon the plaintiff the execution of this paper.

Certainly she had not evinced any intention, prior to that time, to make any gift to the defendant. If it was a gift it was immoderate and disproportionate to her means. Now, it may be admitted that a sister may give her property to her brother, even to the extent of making herself altogether dependent upon him for support. Equity never opposes gifts merely because they are immoderate. *Stat pro ratione voluntas*. But in such case there must be an intention to be liberal; and liberality imports the absence of influence. See *Billage v. Southee, supra*. Such is not the case at bar.

With regard to the alleged expenditures claimed to have been made by defendant, and for which he claims he has not been reimbursed; if they were made, they were made by defendant on the faith of a contract made in 1898, and we therefore do not feel called upon to determine any question with regard to them in this case.

Unless there was a delivery of the deed of February 12, 1878, the defendant has no rights under it.

The evidence and the circumstances satisfy me, that George W. Goodhue, as a fact, never delivered this deed to defendant; and even if it were conceded that he gave the deed of this property to this defendant, as defendant claims, it was even then,

not a delivery of the deed *as such*, nor did the defendant accept it *as such*; so, that it can not be said, that merely because grantor handed the deed to the defendant, grantee, that title vested in defendant *eo instanti*, shorn of all conditions. If the deed was given to defendant at all, it was given merely for the purpose of transmitting it to the recorder on the death of the grantor. Possession by the defendant of this deed, was not conclusive that the actual delivery had taken place. Delivery is always an important question of fact to be solved in the light of the surrounding circumstances. The circumstances and the conduct and acts of both grantor and defendant indicate clearly that grantor never intended to part with his right of control of the deed or the property, and the acts of both at this time and subsequently are utterly inconsistent with any other theory. The fact that the grantor had not parted with his right of control is clearly manifested "just as if he had so expressly declared" (*Mitchell v. Ryan*, 3 Ohio St., 377, 382) by his many acts of dominion as well as by his express declaration that he had control.

In the case of *Williams v. Schatz*, 42 Ohio St., 47, the grantor gave a deed to "B," and he said: "Take this deed and keep it. If I get well I will call for it. If I don't give it to Billy." The grantor died, and B handed the deed to the grantee, who caused it to be recorded. It was held that there was no delivery, and that B was the agent of the grantor. In the case at bar, the defendant himself drew this deed as well as others for his father, whose adviser and lawyer he was, it seems. In the light of the relation existing and under all the circumstances and the evidence, he was acting simply as an agent of his father, who he claimed said, "take this deed, hold it, when I die give it to the recorder." The death of the grantor would have revoked this authority; for real estate after death can be disposed of by will only, and not by deed. It made no difference if the deed was handed to the grantee himself, to constitute a good legal delivery something more is required than simply handing over to the grantee a deed perfectly executed. As was said by our Supreme Court:

1906.]

Goodhue v. Goodhue.

"It proves that a grantor may hand over to a grantee a deed, perfectly executed in all respects except delivery, without that act being of necessity a delivery; that the grantee has a legal capacity to receive the deed into his manual possession for other purposes than those of grabbing the instrument, and appropriating its subject-matter; and that the grantee may even be made the agent of the grantor for purposes connected with the disposition of the paper prior to the time when it is to be delivered in accordance with the intentions and agreement of the parties. * * * True, it is said in that case, and is the established doctrine, that a grantee can not be made the depositary of an escrow, although he may be made the agent of the grantor, for the purpose of transmitting it to the depositary" (*Cin., W. & Z. Ry. v. Niff*, 13 Ohio St., 235-253).

As I have said, the grantor must part with the right of control and the right of recall of the deed (3 Washburn, Real Estate, 254). But in this case he did neither. The fact that there was no absolute delivery of the deed, is not only indicated as already stated, but is further reinforced by my finding this very deed, eight years after its alleged delivery to the defendant, in the grantor's possession, a very pregnant circumstance that the supposed delivery of this deed was not absolute. (Thurman, J., in *Mitchell v. Ryan*, 3 Ohio St., 377.) And the possession of this deed by the grantor is entirely unexplained by the alleged grantee. There having been no delivery of the deed of February 12, 1878, as such, the defendant's contention must fail.

The plaintiff may take a decree as prayed for with costs.

Wm. L. Dickson, for plaintiff.

Edward Colston, contra.

DELEGATED POWER TO INSANE ASYLUM TRUSTEES.

[Common Pleas Court of Franklin County.]

THE STATE OF OHIO V. THE TOLEDO & OHIO CENTRAL
RAILWAY COMPANY.

Decided, April 17, 1905.

State Lands—Right of Railway to Cross—Contract Therefor—Power to Make Delegated to Asylum Trustees—Once Exercised Becomes Functus Officio as to Modifying Conditions—Riparian Rights.

The power delegated by the General Assembly to the board of trustees of the Central Insane Asylum, to consent to a grant of a right of way for a railroad over certain land belonging to the state of Ohio, was exhausted when exercised, and as to any subsequent consent by this board to modifying conditions of the grant the power thus delegated is *functus officio*.

BIGGER, J.

This case has been submitted to the court upon an agreed statement of facts. The plaintiff, the state of Ohio, seeks to obtain an injunction restraining the defendant corporation from erecting an embankment upon its right of way across a certain tract of land located in this county and belonging to the state of Ohio, and known as "the Central Asylum pumping station tract," and from the agreed statement it appears that the state is the owner of this tract of land, containing a little less than two acres and lying upon the bank of the Scioto river, which is now and has been for many years used as a site for a waterworks to supply water to the Central Asylum or State Hospital, and to the Institution for Feeble-Minded Youth; that on the 25th day of April, 1893, the Legislature of the state adopted a joint resolution, found in 90 O. L., page 386, which in substance provided that on the payment into the state treasury by the defendant corporation of such an amount of money as might be agreed upon by and between the canal commissioners of Ohio and the officers of the railway company, the governor was authorized and required to grant by deed to the rail-

1905.]

State v. Toledo & Ohio Central Ry. Co.

way company and its assigns, a right of way for said railway over said tract of land, said right of way to be fifty feet in width and to be defined by a certificate and description to be made by the canal commissioners. It was also provided that the grant was to be subject to the consent of the trustees of the Central Insane Asylum. It was further provided that the boundary line of the ground on the side next to the Scioto river should be defined by courses and distances so that a strip should be reserved to and owned by the state next to the river in order that no riparian rights of the state in the Scioto river may be conveyed or surrendered by the grant of the right of way, and it was provided that the deed should define the right of way by metes and bounds and courses and distances and should reserve all the riparian rights in the river to the state; and further that there was to be a reservation to the state of a right of way at such point as might be determined by the trustees of the asylum to cross the tracks and grounds of the railroad company, for the purpose of constructing any other railway or switch thereto; and provided further that the state should have the right to lay and maintain water pipes across the said right of way.

In pursuance of the provisions of this resolution it appears that the canal commissioners, by and with the written consent of the trustees of the Central Insane Asylum, entered into a contract with the defendant for such right of way, which contract was evidenced by and embodied in a deed from William McKinley, then governor of Ohio, to the defendant company, which deed has been lost, but a true copy of which is set out in the agreed statement. And it is agreed that the conditions embodied in the conveyance and contract by the canal commissioners were prescribed by the trustees of the Central Insane Asylum. One of these conditions was that the track of the defendant company across this strip of land should be built upon trestling so as to reserve all riparian rights of the plaintiff and to enable it at any time to make additional arrangements necessary to perfect or enjoy the water supply, and at all times to keep the same open and in such condition that the

state may have access to the lands under such railway and the sites adjacent thereto necessary to maintain, repair or enjoy the said water supply, and it was agreed that the railway company should so construct its railway upon the land that no structure then existing in connection with the waterworks or that it might in the future be found necessary to construct should in any way be interfered with or obstructed. And the railway company agreed to build a tight floor to its tracks across the land in question so as to prevent dirt and filth from being dropped upon the land. The canal commissioners fixed the sum to be paid by the defendant for the right of way at seven hundred and eighty dollars, which was paid by the defendant; that in pursuance of the contract the defendant entered into possession of the right of way and continued thereafter to operate its road across this tract of land in accordance with the terms and conditions of the contract; that on the 27th day of April, 1899, the defendant submitted a proposition to the board of trustees of the Central Insane Asylum by the terms of which the defendant offered to build a switch from its track to the pumping stations, and do certain other things, upon the condition that the board of trustees would grant to the defendant the right to make a fill across the land in question, instead of a trestle, and this proposition was accepted by the said board of trustees. Thereafter the defendant entered upon the work of making the improvement which it had agreed to make in consideration of being permitted to make a fill in place of the trestle, and expended in that work the sum of five hundred and ninety-seven dollars and fifty-six cents, when it was stopped by a temporary injunction, issued in this case, restraining it from further carrying out the terms of the contract between the defendant and the board of trustees of the insane asylum. The use which the state has made and is making of the tract of land in question is then set out at length, showing that in addition to the pumping station there is a large well or cistern and that the space between the pumping house and the river is largely occupied by subterranean caverns, passageways, tunnels, filter-beds and water-

1905].

State v. Toledo & Ohio Central Ry. Co.

mains, used in connection with the pumping station. It was then further agreed that on April 20, 1904, the board of trustees of the asylum adopted a resolution rescinding their action of April 27, 1899, authorizing the defendant to make a fill across the track instead of a trestle.

The decision of this case turns upon the question of the power or authority vested by the Legislature in the officers delegated to enter into this contract. The joint resolution authorized the canal commission to grant the right of way subject to the written consent of the trustees of the Central Insane Asylum. The resolution provided that a strip of land should be reserved by the terms of the conveyance between the track and the Scioto River in order that no riparian rights of the state may be conveyed or surrendered by the grant of the right of way and that the deed should define the right of way by metes and bounds and courses and distances and should reserve all riparian rights in the Scioto river to the state of Ohio. The state's claim is that by the terms of this joint resolution the board of trustees of the Central Insane Asylum were not vested with any continuing authority or power with reference to the subject-matter of this grant and conveyance, but that the power of the board of trustees was exhausted when they had given their consent to the grant of the right of way.

It is a well established principle of law that such public officers have only such powers as are expressly delegated to them, or necessarily implied from the express powers delegated. Whatever rights or powers these agents, delegated by the state to enter into this contract, possessed must be derived from the resolution itself. It seems to me a consideration of the terms of this resolution, and the nature of the power conferred upon the board of trustees by the resolution, leads irresistibly to the conclusion that the extent of the authority of the board was to consent or withhold consent to the proposed contract, but that once having consented, the authority or power conferred was *functus officio*. It seems to me it would be difficult to conceive of a clearer instance of the application of power to perform an act, single in itself and in its nature, and

functus officio by the single exercise thereof, than the power conferred. These officers were to execute a contract, evidenced and embodied in a deed to be signed by the governor. No clearer case of a power exhausted by a single exercise could well be conceived. When the contract was made and the deed executed and delivered, their powers and duties were ended. From the very nature of things the power was exhausted. They were not to make any further grants, nor were they authorized to rescind or modify the action which they were authorized to take. It seems entirely clear to me that after the contract was made, and the consent of the board of trustees given, that the board had no further power in the premises, and that it was entirely without authority to make the subsequent contract of April 27th, 1899, and that such attempted exercise of power by said board conferred no rights upon the defendant.

But it is argued by counsel for the defendant corporation that the state's position in this matter is untenable because no authority or power was granted to the board of trustees or any of the officers delegated to make this contract to impose any other conditions than those provided by the resolution, and that as the resolution did not contain the condition that the defendant company should construct its track on a trestle across this tract of land, that such condition embodied in the contract or deed of conveyance was null and void and of no effect. I can not accept this view of the matter. Attention is called to the statement in the agreed statement that the conditions embodied in the conveyance were prescribed by the trustees of the asylum, and it is said that they had no such power. But it is also said that the conditions were embodied in the contract by the canal commissioners. The canal commissioners had a right to receive suggestions as to the form of the contract from any source they saw fit. True they were not bound to adopt them, but when they adopted them they necessarily made them their own and a part of their contract. But while the board of trustees was not a party signatory to the contract, yet the board was in reality a party to this contract as much as the canal commissioners. It could only be made by obtaining

1905.]

State v. Toledo & Ohio Central Ry. Co.

the consent in writing of the board to the grant. This implies upon the part of the board the exercise of discretion in consenting or refusing to consent to the terms of the grant. The resolution clearly does repose discretion in both the canal commissioners and the board of trustees of the asylum. It is manifest from the language of the joint resolution that it does not purport to contain in detail all the terms and conditions of the contract to be entered into. To some extent this was left to the discretion of the officers entrusted with this work, and the canal commissioners were entrusted with the duty of making a survey to be defined by metes and bounds. It clearly reposed in both boards the duty and responsibility of so framing the contract or conveyance as to preserve the riparian rights of the state in the Scioto river.

The decisions of the Supreme Court of this state have established the right of a riparian owner to make such use of the waters of the stream as is being here made by the state. I think it was not only the right and duty of the canal commissioners, but the right and duty of the board of trustees of the insane asylum, to see to it that the riparian rights of the state were guarded, and it was in pursuance of this right and duty that the suggestions were made by the trustees as to the conditions to be embodied in the contract so as to protect the riparian rights of the state.

It seems to me there is no escape from the conclusion that it was manifestly the legislative intention in inserting this requirement, that the grant could only be made with the consent of the board of trustees, that this would be an additional safeguard against the danger of the grant being made so broad as to relinquish some of the state's rights as a riparian owner, in which rights the insane asylum was especially interested. I am of opinion that there is no grant of legislative power to the canal commission or to the board of trustees, but a discretion reposed in them, in the exercise of which they were acting judicially, and that having exercised the power, their power and authority ended. I have therefore concluded that the act of the board of trustees of April 27th, 1899, in attempting to

rescind one of the terms and conditions embodied in the contract, was beyond the scope of their authority, and that the act was null and void and conferred no rights upon the defendant corporation; and that therefore the state is entitled to a permanent injunction restraining the defendant company from making the fill.

Furthermore, I do not think if the power resided in the board of trustees that it could be done without the consent of the canal commission.

An exception may be noted.

Q. R. Lane, for plaintiff.

B. L. Bargar, for defendant.

1905.]

Volk v. Village of Westerville.

**VIOLATION OF LIQUOR LAWS—PROOF OF A SINGLE
OFFENSE.**

[Common Pleas Court of Franklin County.]

W. F. VOLK v. VILLAGE OF WESTERVILLE.

Decided, July 29, 1901.

Liquor Laws—Unlawfully Keeping a Place—Where Intoxicating Liquors are Sold at Retail—Proof of a Single Offense—Change of Venue from Mayor's Court—Section 6529 not Applicable—Affidavit not Bad for Duplicity, When—Per Diem Paid to Witnesses for Prosecution—Proper Subject for Cross-Examination—Election Between Charges.

1. In a prosecution for unlawfully keeping a place where intoxicating liquors are sold at retail, it is not error for a mayor before whom the case is brought to overrule a motion for change of venue, made on the ground that he is a material witness in the case, where it does not affirmatively appear from the record that there was any authorized officer or person to whom the case could have been legally sent for trial.
2. An affidavit is not bad for duplicity in such a case, because it charges several distinct offenses of the same kind requiring punishments of like nature; and the discretion of the trial court in overruling a motion to require the prosecution to elect upon which count it will proceed will not be interfered with, unless it appears that it was exercised to the manifest injury of the defendant.
3. Proof of a single sale is sufficient to establish the charge that the defendant did unlawfully keep a place where intoxicating liquors were sold.
4. The *per diem* which the prosecution has agreed to pay its witnesses, in addition to the fees which they will receive under the statutes, is a proper subject of cross-examination; but where the fact of an agreement to pay a *per diem* and the amount thereof is subsequently disclosed by the testimony of other witnesses, it is not likely that injustice resulted from the sustaining of an objection to that line of examination, and a reversal of the judgment will not be granted on that ground.

E. P. EVANS, J.

On the 28th day of November, 1900, the plaintiff in error, Volk, was found guilty in the mayor's court of Westerville of

unlawfully keeping a place where intoxicating liquors were unlawfully sold at retail, as charged in the first, second and third counts of the affidavit filed in said mayor's court; and on the 6th day of December, 1900, said mayor's court by reason of said convictions, for each of said three separate and distinct offenses sentenced said Volk to pay a fine of \$150 and costs of prosecution, making in all \$450 and costs.

The case is here on error and this court is asked to reverse the said judgment and sentence for various reasons assigned in the petition in error. Such of these alleged errors as appear to be relied upon chiefly will be briefly alluded to in this opinion.

November 23, 1900, Volk filed a motion for a change of the place of trial of the case for the reason that the mayor was a material witness for him and that without his testimony he could not safely go to trial. This motion the mayor overruled, and Volk excepted. It is now insisted that in such ruling the mayor erred. Volk's counsel relied on Revised Statutes, Section 6529, as authority for making such motion, but that section, I think, is not applicable, and if it is not applicable to a prosecution before the mayor for a violation of a village ordinance, it seems that there is no legislation authorizing the mayor to entertain such motion.

Revised Statutes, Section 1744, provides that the mayor, within the corporate limits, "shall have all the jurisdiction and powers of a justice of the peace in all civil cases." "He shall have jurisdiction in criminal cases as hereinafter provided." My attention has not been called by the learned and diligent counsel in this case to any legislation, nor have I found any in the Municipal Code, or elsewhere in the statutes of Ohio, whereby said Section 6529 is made applicable to prosecution before mayors for the violation of ordinances. My attention is called to the latter part of Section 1837, which provides that:

"In cities having no police judge, in the absence or during the disability of the mayor, he may designate a justice of the peace to perform his duties in criminal matters, which justice shall, during the time, have the same power and authority as the mayor."

1805.]

Volk v. Village of Westerville.

But this provision is by its terms restricted to cities *having* no police judge. It is probable that this provision was not extended to villages because of the provisions in Section 1831. This section authorizes the council in villages, upon the mayor's recommendation, to appoint a police justice who shall have "concurrent jurisdiction of all prosecutions for violations of ordinances of the corporation, with full power to hear and determine the same."

The record is silent as to whether there is any such officer as "police justice" in the village of Westerville, and hence I must consider the case as if there were none. As it does not affirmatively appear from the record that there was any authorized officer or person to whom said cause could have been legally sent for trial by said mayor, this court can not conclude that he erred in overruling said motion.

2. The defendant filed a motion to quash the affidavit filed before said mayor, November 12, 1900, for the reason that the affidavit is bad for duplicity, and upon its face charges three separate and distinct, independent and disconnected offenses against the ordinance referred to in said affidavit. This motion was argued, submitted and overruled, and Volk excepted. Volk also filed a motion to require the village to elect upon which of said charges it would proceed to trial; the mayor overruled said motion, and Volk excepted.

In prosecutions for misdemeanors several distinct offenses of the same kind, requiring punishments of like nature, may be joined in separate counts of the same pleading (10 Ency. Pl. and Pr., 549). The trial court may in its discretion sustain a motion to require the prosecution to elect upon which count it will proceed, or the court may overrule such motion, in the exercise of its discretion, and its action thereon, as a general rule, will not be interfered with, unless the discretion has been to the manifest injury of the defendant (10 Ency. Pl. and Pr., 551; *State v. Bailey*, 50 O. S., 636, 640).

In *Bailey v. State*, 4 O. S., 440, it is held, "where an indictment charges two or more offenses arising out of distinct and different transactions, the court trying the cause may require the prosecutor to elect upon which charge he will proceed; but

the action of the court in this respect, being a matter of discretion, can furnish no ground for a writ of error, unless there be an abuse of discretion" (*State v. Bailey, supra*; see *Eldridge v. The State*, 37 O. S., 191).

It is not manifest from the record that in the overruling of said motion Volk was embarrassed or injured in making his defense.

3. It is also insisted that evidence did not show that the said Volk did unlawfully keep a place where intoxicating liquors were sold at retail, and also, that if the evidence did not show that he did, that he could not, under the charges in the affidavit, be found guilty of more than a single offense.

Volk v. The Village of Westerville, an unreported case decided by the circuit court of this county about a year ago, is an authoritative decision which this court should follow. In that case it appears from the written opinion of the court delivered by Sullivan, J., that the court held that proof of a single sale was sufficient without proving a series of sales, to constitute the offense charged that the defendant did unlawfully keep a place where intoxicating liquors were sold at retail; that the case of *Miller et al v. The State*, 3 O. S., 477, has no application as an authority to the case at bar. With this decision to guide me, I can not say that the record before me shows that the finding and judgment of the mayor's court is contrary to the law or the evidence.

4. Nor can this court say in the light of *Alliance v. Joyce*, 49 O. S., 7, that the ordinance under which the prosecution was had is void because providing for an excessive fine.

5. The remaining question to be mentioned in this opinion relates to the rulings of the mayor as to the admission and rejection of testimony. The question here is whether such rulings of the mayor are erroneous to such an extent as that his judgment should be reversed. This question, as I understand it, is the most serious question appearing upon the record. Some of the questions put to the witnesses for the prosecution on cross-examination as to how much money they had received, or were to receive for their services and testimony in the case, were objected to by counsel for the prosecution and the objections

1905.]

Volk v. Village of Westerville.

were sustained by the mayor. Such questions, or at least, some of them, the mayor should have required the witnesses to answer. Thus, for example, at page 72 of the bill of exceptions, these questions were put by defendant's (Volk) counsel on cross-examination of W. A. Allaman:

"Q. Do you draw your pay from this League for coming here to-day?

"A. Yes, sir.

"Q. Regular *per diem*?

"A. Yes, sir.

"Q. How much?

"(Question objected to by plaintiff as immaterial; objection sustained; exception by defendant)."

The credibility of a material witness is always in issue and his interest, if any, in the result of the case or in the prosecution may be shown by cross-examination. Hence, it seems, some of the witnesses like Mr. Allaman were to be paid a *per diem* for attending the trial in addition to the fees allowed them by the statutes as witnesses. The amount of such *per diem* was a proper subject of cross-examination, and should, when proved, be considered by the trial court as a proper circumstance touching the witnesses' credibility. Such a circumstance might be entitled to but little, if any weight, or it might seriously affect the witnesses' credibility. The question here is not as to what weight the circumstances, if proven, would have had, but the question goes to the right of the defendant to investigate and show to the court, if he could, that the witnesses were not credible but were influenced by some undue or improper motive or consideration. Proof, however, of what *per diem*, or pay, the several witnesses were to have, appears from the testimony of other witnesses in the case, and for this reason it is probable that no injustice was done. Rev. L. F. Johns testified that Mr. Allaman by agreement was to be paid a *per diem* and his expenses; that he was to have three dollars a day; that he had been paid in all about thirty-five dollars; that Allaman could employ other persons (bill of exceptions, pages, 90, 91); the others, it appears from the testimony of other witnesses, received the same *per diem* and expenses as Allaman.

Mahoney v. Insurance Co.

[Vol. III, N. S.]

The conclusion reached is that the petition in error should be and is dismissed at the costs of the plaintiff in error.

G. H. Stewart, for plaintiff in error.

G. L. Stongton, for defendant in error.

**CONDITIONS PRECEDENT TO A SUIT ON A FIRE
INSURANCE POLICY.**

[Superior Court of Cincinnati, General Term.]

KATE MAHONEY v. THE SCOTTISH UNION & NATIONAL INSURANCE COMPANY.

Decided, March, 1905.

Fire Insurance—Conditions Precedent and Subsequent—Burden of Proof—Waiver of Conditions—Notice to Submit to an Examination—Pleading—Charge of Court.

1. Where the right to examine the insured under oath is provided for in a policy of fire insurance, compliance therewith constitutes a condition precedent to an action on the policy, and where the answer denies compliance in this respect the burden of proof is upon the plaintiff to show that the condition of the policy as to submission to an examination under oath was complied with.
2. A plaintiff who has alleged that he "has duly kept, observed and performed all the requirements and conditions contained in said policy," is not in a position to avail himself of a waiver of the provision as to an examination under oath, even if the conduct of the company had been such as to constitute a waiver.
3. Notice of the intention of the company to have an examination is sufficient, when it states the time and place of the examination and the name of the person who is to conduct it.

HOFFHEIMER, J.; HOSEA, J., and CALDWELL, J., concur.

The action was on a fire insurance policy issued to plaintiff in error, who was plaintiff below, defendant in error being defendant below.

The facts disclose that plaintiff was the owner of the property insured; that a fire destroyed the same; and that she took certain steps required in the policy to prove her loss, namely: no-

1906.]

Mahoney v. Insurance Co.

tice, proof of loss, and certificate of nearest notary. It was claimed that defendant, through its adjuster, refused to furnish blanks for proof of loss, mentioning, however, stores where blanks could be bought, and also stating that "In this case we will do nothing;" also, "These proofs will do you no good." Later, on June 10, 1901, the company, through its adjuster, served a written notice on the insured to appear at a certain time stated, before J. Louis Kohl, a notary public, at 1201 Union Trust Building, Cincinnati, Ohio, for the purpose of submitting to an examination under oath, and in the same notice she is requested to produce all her books of account, bills, or certified copies if originals were lost. Plaintiff responded to the notice at the time stated. An attorney, J. H. Cabell, undertook to examine her. On the advice of her attorney, who was present, she refused to answer, although it was made known to plaintiff that Mr. Cabell was the attorney acting for the company and this information was given by the adjuster who was present; it appearing, also, that the attorney for the plaintiff had been notified in writing, by the home office, that this same adjuster was acting for the company and had the entire matter in his hands. Subsequently, on June 29th, plaintiff's attorney wrote to this company that no payments had been made, as required by the policy, within the sixty day limit, and that no objections had been made to the proofs of loss as required, and that, unless he heard from defendant on receipt of this letter, he would begin an action under the policy. The company's attorney immediately wrote him that the company could not admit or deny liability as long as the assured refused to submit to an examination under oath, or refused to furnish accounts, bills, etc. Thereupon plaintiff filed her petition, *alleging compliance* with the terms of the policy. The answer denies compliance, and alleges that she failed to submit to an examination as required by the policy. Verdict was had for the defendant.

Plaintiff in error brings these proceedings to reverse the proceedings below. And it is claimed that the court erred in instructing the jury that the burden of proof was on the plaintiff to show that she had complied with the conditions in the policy,

that she should submit to an examination under oath touching any matters provided for by the policy, and should furnish invoices, bills, or certified copies of same. Plaintiff in error contends that the burden of establishing the failure of insured to comply with this provision was matter of defense, and that it was not available in this case as a defense because the acts and conduct of the defendant company's agent, as set forth in the statement of facts, amounted to a waiver; and that the notice to submit to examination was inoperative, because no person was designated in said notice to conduct the examination.

We are of the opinion that the charge of the court properly stated the law. The right to examine the insured, if demanded, is distinctly provided for in the policy; and, by a fair construction of the policy, it is a condition precedent, and not a condition subsequent. The former merely goes to the right of action; the latter is usually a proviso inserted by defendant, breach of which avoids or renders inoperative the policy.

"The condition precedent, performance of which the plaintiff is required to plead in an action on such a policy, includes only those affirmative acts which are necessary in order to perfect his right of action on the policy, such as giving notice and making proof of loss, furnishing the certificate of the magistrate when required by the policy, *and it may be other acts of like nature*. The conditions which provide that the policy shall become void or inoperative, or the insurer relieved wholly or partially from liability upon the happening of some event, or doing, or omitting to do some act, are matters of defense, and, to be available, must be pleaded and their breach alleged." Syllabus 2, *Moody v. Insurance Company*, 52 O. S., 12; *Milwaukee Mechanics Insurance Company v. Russell*, 65 O. S., 230.

In the case of *Moody v. Insurance Company*, the policy contained a provision that the company shall not be liable "for loss of damage in or on vacant or unoccupied buildings, unless consent for such vacancy or non-occupancy be endorsed." Here, however, was a provision making the policy void. Its vacancy was proven. And it was held that such a provision was a condition subsequent. The breach of such a condition must be

1906.]

Mahoney v. Insurance Co.

established by the defendant. In the case at bar the provision requiring the insured to submit to an examination under oath is, it seems to us, an affirmative act to be performed by the plaintiff to perfect her right of action, and is an act similar to submission to appraisal, notice, proof of loss, and furnishing bills. It certainly was never in contemplation of the parties that failure to comply with such a provision was such a breach as would render the *policy* void or inoperative. It is a reasonable provision for the purposes indicated, and it is one that the insured should, in all fairness, submit to. It is, then, a condition precedent (Clement on Fire Insurance, page 253, rule 4). And the burden was on the insured to show compliance with such condition. (*Insurance Company v. Carnahan*, 63 O. S., 258, at 268 *et seq.*)

Was there a waiver? Plaintiff claims that certain acts and conduct of defendant, as detailed in the facts herein, justified the insured in believing that an attempt on her part to perform would not be responded to by the company. This, it is claimed, is borne out by the special finding of the jury that there was a denial of liability. We think the record fails to show evidence sufficient to constitute a waiver. (See *Insurance Company v. Carnahan*, 63 O. S., 259).

And even if it did, plaintiff, under the pleadings, was in no position to avail herself of it. Where a party seeks to recover on a contract of insurance, or any other contract, and avers performance of all the conditions to be by him performed, as did the plaintiff herein, it is not competent, under such a pleading, to prove a waiver of such conditions (*Eureka Fire & Marine Insurance Company v. Baldwin*, 62 O. S., page 368). The plaintiff positively averred "She had duly kept, observed and performed all the requirements and conditions contained in the said policy." And she proved, or attempted to prove, a waiver. She alleged a compliance, and proved she did not comply. This can not be done. The special verdict, therefore, was not inconsistent with the general verdict.

Was the notice to the plaintiff to submit to the examination under oath inoperative? It fixed the time and place and the

person before whom it was to be taken—J. Louis Kohl, a notary public authorized to administer an oath. This was all that was required under the policy. The provision does not necessitate a certification to the insured of the name of the person or agent who is to conduct the examination. The notice states that the company desires to make the examination, and it is reasonable to suppose that this examination will be made through some duly authorized representative of the company. The purpose of stating the time, place and person before whom the examination is to be had is to enable the insured to understand, first, that the company means to have an examination; and, secondly, that he may know with definiteness when and where and before whom that examination is to take place. The examination is recognized as the company's examination. (See Clement on Insurance, note to rule 8, page 255). And when the plaintiff in this case found that the company, through its duly authorized agent, wished to make the examination, it was her duty to answer.

The fact that Mr. Cabell was the attorney for the company was again made known to plaintiff's attorney by letter under date July 1, 1901; and further opportunity was given after the first refusal to submit to this examination, but plaintiff refused to avail herself of this opportunity. It was not only her duty to submit to this examination, but it was incumbent on her to prove that she had done so.

For these reasons, we are of the opinion that the judgment below should be affirmed, with costs; and it is so ordered.

J. J. Acomb and A. J. Cunningham, for plaintiff in error.

J. Hartwell Cabell, for defendant in error.

1905.]

Elyria Milling Co. v. Swartz.

DEFAULT JUDGMENTS TAKEN BEFORE ANSWER DAY.

[Common Pleas Court of Lorain County.]

THE ELYRIA MILLING COMPANY v. JOHN SWARTZ.

Decided, June 28, 1905.

Judgment—Proceedings on Motion to Vacate—Where Taken by Default Before Answer Day—Liens Preserved—And Final Order Made After Verdict.

1. Where judgment was rendered by a justice of the peace on December 30, 1904, and an appeal was taken to the common pleas court, the last answer day was March 11, 1905, and the taking of a default judgment in the common pleas court on March 6, 1905, was an "irregularity in obtaining a judgment, within the meaning of Subdivision 3 of Section 5354, and is, therefore, a ground for suspending such default judgment.
2. Where the proceeding for vacating a default judgment is by motion, it is the duty of the court, after determining that ground exists for its suspension, to preserve the liens obtained thereunder, and require the defendant to answer, with permission to the plaintiff to reply; and thereafter, the case having been submitted to a jury and verdict returned, such order should be made with reference to the default judgment as the verdict warrants.

Thompson, Glitsch & Cinninger cited in support of motion to vacate default judgment taken before last answer day:

Proceedings of justices of the peace when a judgment is appealed from—Section 6585, Revised Statutes.

Rule day for filing petition—Section 6598, Revised Statutes.

Rule day for pleading in court of common pleas—Section 5097, Revised Statutes.

When and how common pleas or circuit judges may vacate or modify judgments or orders after term—Section 5354, Revised Statutes, third subdivision.

Mode of proceeding in certain cases—Section 5357, Revised Statutes.

Limitation of proceedings—*Corry v. Campbell*, 34 O. S., 204.

Default judgment before expiration of day named in summons—*Williamson v. Nicklin et al*, 34 O. S., 123; *Mimmel v. Pratt*, 40 O. S., 344.

Notice to adverse party waived, when—*Elliott v. Plattor*, 43 O. S., 198; *Braden v. Hoffman*, 46 O. S., 639.

Entering default judgment when demurrer is on file—*Follett v. Alexander et al*, 58 O. S., 202.

Grounds for vacating judgment to be first tried—Section 5359, Revised Statutes; *Follett v. Alexander et al*, 58 O. S., 202.

The court should not vacate a judgment absolutely, until—*Braden v. Hoffman*, 46 O. S., 639, at 642.

Section 5360 construed—40 O. S., 639, at 642; *Frazier v. Williams et al*, 24 O. S., 625; *Weston v. Paine*, 25 O. S., 340; 34 O. S., 143.

When enforcement of judgment may be suspended—Section 5361, Revised Statutes.

WASHBURN, J. (orally).

The case of The Elyria Milling Company against John Swartz has been submitted on a motion to set aside a default judgment rendered at the last term of court, it being claimed that the default judgment was taken before the answer day, and was therefore irregular.

It appears from the testimony introduced at the hearing that this case was begun before a justice of the peace, and a judgment was rendered in favor of the defendant on December 30, 1904; the transcript for an appeal was filed in this court on January 14, 1905; the plaintiff filed its petition in this court on January 20, 1905, and judgment by default was entered on March 6, 1905.

As I have said, it is claimed that this judgment was entered before the answer day.

Section 6585 provides that "the transcript in an appeal from a justice court shall be delivered to the clerk of the court to which such appeal may be taken on or before the thirtieth day from the rendition of the judgment appealed from."

That would make the last day on which the transcript could be filed, January 29, 1905.

Section 6598 provides:

"The rule day for filing petition in the court of common pleas in a case appealed from a justice of the peace shall be the third Saturday after the expiration of the time limited for filing the

1905.]

Elyria Milling Co. v. Swartz.

transcript; and the subsequent pleadings shall be filed within such times thereafter as is provided for the filing thereof in cases commenced in that court after the return day of the summons."

Under this section, the last day on which the petition could have been filed was February 18, 1905, and according to said section, the answer "shall be filed within such times thereafter (that is, after the third Saturday after the expiration of said thirty days), as is provided for the filing thereof in cases commenced," in the court of common pleas.

Section 5097 provides that: "The answer shall be filed on or before the third Saturday after the return day of the summons;" that would make March 11, 1905, the last day on which the answer could be filed in this case. Default was taken on March 6, 1905, and was therefore taken before the answer day.

Section 5354 provides that:

"The common pleas court * * * may vacate or modify its own judgment or order, after the term at which the same was made, for irregularity in obtaining the judgment or order."

In the 34th O. S., at page 123, the court decides that:

"A judgment rendered by default, before the expiration of the day named in the summons for answer, may be reversed on error."

And the court in deciding the case on page 126, says:

"And that to render judgment under the circumstances disclosed in this record, was not merely an irregularity, to be only corrected by motion in the court of original jurisdiction, but an error, to correct which the jurisdiction of the district court was properly invoked."

In the 58th O. S., at page 202, the court decides that:

"The rendition of judgment for plaintiff, as upon default, where a demurrer has been duly filed to the petition and remains undisposed of, is an 'irregularity in obtaining a judgment,' for which the court may, upon motion and a proper showing, vacate the judgment."

This then was an irregularity within the meaning of subdivision three of said Section 5354.

Section 5357 provides that:

“The proceedings to correct * * * irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party.”

That notice was given in this case, or if it was not, the adverse party appeared and defended, which would be a waiver of such notice. 43 O. S., 198; 46 O. S., 639.

The real question in this case is, whether there was sufficient evidence introduced at the hearing to justify the court in making an order, either suspending or conditionally vacating said judgment. It being claimed that as there was no evidence introduced at the hearing as to the validity of the defense which the defendant might have to said action, that therefore the court has no right to make such order.

Section 5359 provides:

“The court must first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense or cause of action.”

I have tried and found in this case that there are grounds to suspend said judgment.

Section 5360 provides that:

“A judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment was rendered. * * * And when a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.”

Within the meaning of this section, how is it intended that it shall be “adjudged that there is a valid defense to the action in which the judgment was rendered”; and who is to so adjudge?

In the 25th O. S., at page 345, the court, in deciding that case, says:

“When the existence of ground to vacate or modify is thus decided, the case is not yet ready for a final judgment of vacation or modification. Before such judgment can be entered, if the petition or motion be filed by the defendant in the original action, it must be adjudged that there is a valid defense to the action. In order that the validity of the defense may be ad-

1906.]

Elyria Milling Co v. Swartz.

judged, an issue or issues should be made up by proper pleadings. *If the proceeding to vacate or modify be by motion*, the defendant should be required to file his answer to the original petition, with leave to the plaintiff to reply. If the proceeding be by petition, in which the matters of defense are set forth in issuable form, it would be sufficient, no doubt, to take issue thereon by reply or demurrer. *When the issue is thus made up, it should be tried as in other case.*"

After such trial, and not before, the court is authorized to render a final judgment or order of vacation or modification of the original judgment. To the same effect is the case in the 25th O. S., at page 659.

In the 46th O. S., page 639, the court decides that:

"Although the court may have decided that there is good ground to vacate on motion such judgment rendered on default at a preceding term, it is error to vacate the same before it has been adjudged that there is a valid defense to the action."

And in deciding the case, the court, in speaking of the 24th O. S., 625, and of Section 5360, says:

"It was construed to be the meaning of the statute, that when the court has decided that there is good ground to vacate, the judgment to vacate should be suspended until after the cause is tried; and if, on such trial, the defense is established, then judgment of vacation is to be entered; or, if the defense fails, the judgment is to be affirmed, or such other judgment entered as the result of the trial indicates.

"The object of this provision of the statute, in suspending judgment to vacate until it shall be adjudged that there is a valid defense to the action, is to preserve all liens and rights of parties under the original judgment, in case a similar judgment should be rendered upon the trial of the case."

Under the foregoing authorities, Sections 5359 and 5360, it seems to me to mean that all the court is called upon to do in the first instance is to decide that proper ground exists for the vacation or modification of the judgment, and that then, if it is a jury case, it is the duty of the court, where the proceeding is by motion in the original case, to make an order suspending the judgment, and preserving all liens obtained under it until such

time as it shall be adjudged by a jury that there is or is not a valid defense to the action.

But it is said that the court should have before it some evidence as to the character of the defense which the defendant claims to have, so that the court may decide, admitting the facts to be as the defendant claims, whether or not the facts constitute a defense.

I can see how it might be proper for a court, where the proceedings are by petition, under Section 5358, where the party is required to set out the defense claimed, and where issue is joined thereon, to adjudge that the defense is no valid defense, because the pleadings show that what he claims as a defense is in law not sufficient, and the court might, under such circumstances, adjudge that he had no defense, and therefore refuse to suspend or vacate the judgment. But that would not apply to a case where the proceeding is by motion, where the defense claimed is not required to be set up in the motion.

Even if some evidence as to the validity of the defendant's defense was necessary in this case, it appears by the transcript that judgment was in his favor in the court below, and there being no other evidence on that subject, it seems to me that that is some evidence tending to show that he has a valid defense.

But whether or not there was any evidence as to the validity of the defendant's defense, I feel certain that under the foregoing decisions of the Supreme Court, this proceeding being by motion, that the court can do nothing else but order a suspension of the judgment in this case, preserving the liens obtained thereunder, and require the defendant to answer, setting up his defense, and permit the plaintiff to reply thereto, and then submit the case to a jury, and, after verdict is obtained, make such order as to the vacation of the default judgment as the verdict warrants. And such will be the order in this case.

Johnston & Leonard, for plaintiff.

Thompson, Glitsch & Cinniger, for defendant.

TELEPHONE MAINS IN THE STREET AN ADDITIONAL BURDEN.

[Common Pleas Court of Franklin County.]

WILLIAM T. BURNS v. THE COLUMBUS CITIZENS' TELEPHONE COMPANY; AND DANIEL E. SULLIVAN v. THE COLUMBUS CITIZENS' TELEPHONE COMPANY.

Decided, May 25, 1905.

Telephones—Laying of Mains in the Street—Imposes an Additional Servitude—Scope of the Original Dedication—Easement of Abutting Lot Owners—Their Right to the Subsoil—Private Uses as Distinguished from Street Uses.

1. The dedication of a street does not deprive an abutting lot owner of any right therein not inconsistent with the paramount right of the municipality to hold and use the ground so dedicated in trust for street purposes.
2. Among the rights retained by the abutting lot owner in that portion of his lot dedicated for street purposes is the right to the subsoil thereof, except as it may be needed for street purposes; and the use of such subsoil for the purpose of constructing conduits for the conveyance of telephonic communication is not embraced in the original dedication of the street, and imposes a new servitude.

DILLON, J.

Each of these cases involving the same question is presented to the court upon the sufficiency of the answers filed. It might be pertinent to inquire whether or not some of the denials of the answer should not be examined by the plaintiff as to whether any material allegations of the petition are denied and which will not be discussed on my consideration of this demurrer. I assume that the denials that the plaintiff has any easement in the soil in front of their premises and that the ditch and conduit when constructed will interfere with the plaintiff's enjoyment of the premises and the further denial that any damage of any kind will result to the plaintiff, are legal conclusions and not intended to be considered by me upon this demurrer, and therefore I shall as briefly as possible confine my-

1905.]

Burns and Sullivan v. Telephone Co.

self to the main question which counsel have presented to me.

The dedication of the street in question to the municipality of the city of Columbus in law gave this street property to the city in trust for street purposes. The lot owner in addition to the ordinary rights of the public has special easement and special privileges for the use of his lot, not only for ingress and egress, but embracing perhaps every right not inconsistent with this paramount right of the city to hold and use this street in trust for street purposes. The vacation or abandonment of the same by the city puts the entire title or fee of the lot in the lot owner.

With this fundamental principle of law before us, we come to the great variety of opinions which have been adopted by the various Supreme Courts of the states of the Union as to what particular things are embraced in this trust of the city or in what may be termed street purposes.

As to the right of the defendant to lay a conduit for telephone purposes there is no question, and that question can not be involved here. That right has been conferred upon it by the state, as well as by the municipality itself; the question is whether or not in exercising that right, it must in the present instance first resort to eminent domain, or, in other words, whether or not it violates any property right of the plaintiff in using a space a few feet cube through the soil in front of the plaintiff's property.

I shall not review the cases which have been presented, bearing on this subject. Some of the courts have construed the original dedication for street purposes so strictly that they could only embrace those purposes which were in the minds of the people themselves at the time of the dedication of the street. Manifestly, this limitation was incorrect. The dedication is for the uses and purposes of the street as the same at that time are construed to exist in legal contemplation, the law itself contemplating the things, purposes and uses for which that street was dedicated. Without this same construction, as a matter of law, our streets and alleys would remain confined to the original village purposes with the ox cart as the only means of travel, and with every other means barred. The

broadest view taken by some courts is that streets and alleys in legal acceptance and contemplation of the purposes for which they are dedicated, were for all general public uses for individual comfort. This would embrace all those purposes and conveniences which the modern society and civilization demand, such as the use of the street for water pipes, for gas, for electricity, for telephone, for hot water, and in some communities for fresh and cooled air, and with no limitation as to future demands of the public in the progress of civilization and public comforts. Probably the most recent discussion of this question will be found in *Mordhurst v. The Ft. Wayne & S. W. Traction Valley*, recently decided by the Supreme Court of Indiana, and which may be found in 71 N. E. Rep., 42.

Counsel for the defendant very logically, it seems to me, put the question on page 11 of their brief, and that is this:

“Is the use of the highway for the purpose of a telephone line within the scope of the original condemnation of the land or does a telephone line along a street constitute a new servitude or burden upon the soil?”

I feel, however, that it is not permitted me to give my opinion upon all the questions presented in the very comprehensive brief of defendant's counsel. The limitation is upon this court to confine itself to the ascertainment and declaring of the law as it exists in this state. I conceive it the special privilege and province of counsel for defendant to present *in extenso* much of the argument of their brief to the tribunal whose special prerogative and privilege it is to modify or reverse the former policy of the state on this question.

These distinctions of uses of the street are many of them exceedingly technical and almost artificial.

On the question of street railways we find at pages 267 and 268, *et seq.*, of Lewis on Eminent Domain, a discussion of the author on the doctrine that a street railroad is a legitimate street use provided the road is devoted exclusively to street passenger traffic, but that if it used a car exactly the same size and dimension in which baggage is carried, such use would be an additional burden. Doubtless the logic of this distinction of the courts was that the carrying of baggage or freight was

1905.]

Burns and Sullivan v. Telephone Co.

not a legitimate street use, and yet it must be confessed that people in all times have had the perfect right to haul freight, hay, grain and baggage in ordinary vehicles over the same street. And the author further says:

"A review of cases shows how conflicting and irreconcilable are the authorities. The weight of authority is that a street passenger railroad laid on the surface or established grade of a street is the legitimate street use, while all other railroads are not. But what rational basis is there for a distinction between freight and passenger traffic? It can not be denied that streets and highways have been established as much for the transportation of freight as for the movement of persons. It is a distinction which can not be founded upon the nature and use of streets. Nor can any logical distinction be made between local and long distance traffic."

Upon this same line of argument, it might well be said that the use of the sub-soil of a street for the conveying of communication between the citizens of a city is much less an interference with the rights of an abutting lot owner than laying a street car track on the surface of the soil, and it might be further well argued that in dedicating a street to the public, the expression "street purposes" might well include public purposes which of necessity and convenience should go along that street, whether it be the mere moving of persons, the moving of traffic or the conveyance of the necessities and conveniences of life.

Recurring to our own state and its declared policy upon this subject, it must be admitted that the law seems now settled and from it we deduct two legal conclusions. First, that among the rights of an abutting lot owner consist the right to the sub-soil in front of his house except as it may be needed for street purposes. And second, that the use of that same property beneath the surface of the street for the purpose of conveying telephonic communications and of laying wires for that purpose, is not embraced in the original dedication of the street. As the language is used by Judge Spear in the Callen case, "It is wholly for private use. Hence, it is not a street purpose."

1905.]

Borger et al v. City of Columbus et al.

I have arrived, therefore, at the same conclusion as to the Ohio law upon this subject as my associate in the case of *Federal Gas & Fuel Company v. Townsend*, 1 N. P.—N. S., 289, and the demurrers to the answers therefore will be sustained. Exception noted for counsel.

If counsel for the defendant wish to amend, ten days will be given for that purpose.

Barton Griffith, for plaintiff.

F. A. Davis, for defendant.

MUNICIPALITY NOT A TRUSTEE FOR THE PROFIT ARISING FROM THE REFUNDING OF BONDS.

[Common Pleas Court of Franklin County.]

SAMUEL BORGER ET AL V. THE CITY OF COLUMBUS ET AL.

Decided, December 24, 1904.

Municipality—Not a Trustee for Abutting Owners—In Refunding Street Improvement Bonds—Owner of Bonds—Without Recourse Against Abutting Property Owners.

A municipality, in advancing the cost of a street improvement, assessed against the abutting property, does not act exclusively as trustee for the abutting owners, and is not bound to account to the abutting owners for the profit arising from a subsequent refunding at a lower rate of interest of the bonds which produced the fund from which payment for the improvement was made.

DILLON, J.

But two questions are presented in this case:

First, as to whether or not the assessment upon the plaintiff's lots for the improvement of West State street, this city, specially benefited the said lots to an amount equal to the assessment which was thereafter levied upon said lots, and, if so, whether these special benefits thus conferred were such as were in addition to the benefits common to the general public. My

* Affirmed by the Circuit Court, 6 C. C.—N. S., 401.

conclusion is that the plaintiffs have not established their case on this issue, and the finding must be in favor of the defendants.

Second. A new question, not only in this court but probably in all the courts of the state, is raised as to the relationship existing between the city and these property owners with reference to the interest which the property owners are compelled to pay, to-wit, 6 per cent., and the interest which the city itself was paying upon part of the bonds issued for the street, to-wit, $4\frac{1}{2}$ per cent.

The testimony of Mr. Gemuender in this case shows that the city of Columbus, acting under the act of March 17, 1893 (90 O. L., 100), refunded about \$600,000 worth of 6 per cent. bonds outstanding for a new issue of $4\frac{1}{2}$ per cent. bonds due in 1907. The assessment in the case at bar provides for the entire payment in annual installments, the final installment to end in 1911 and the installments to bear interest at 6 per cent., the option having been given the property owners, however, to pay the entire amount off at any time. The city had, at that time outstanding over \$3,000,000 of bonds which had previously been issued for the improvement of various streets in this city, and endeavored to refund as many as possible of these bonds for a new issue at $4\frac{1}{2}$ per cent. And as above stated, it succeeded in getting \$600,000 of these old bonds surrendered for the new issue. A certain percentage of this new \$600,000 had been issued in lieu of the original 6 per cent. bonds for the street involved in this case.

I have not the benefit of the research and argument which counsel doubtless on further time and upon further investigation will be able to give this point. The question involves the fundamental relations which exist between the city on the one hand and the property holders on the other. If the city of Columbus when it advances the money to pay for a street is acting solely and exclusively as a trustee for the property owners, then it naturally follows as such trustee that in the absence of any intervening facts, it is bound to account strictly to the property owners for every cent which it collects from it, and as a result of such a relation it would follow that the property

1906.]

Borger et al v. City of Columbus et al.

owners as a *cestuis que trustent* would be bound to reimburse the city for all losses which the city might have by reason of failure of property to pay the full assessments or by reason of the increased rate of interest which it might afterwards have to pay, or by reason of the removal of a part of the assessment by legal proceedings from any particular property.

In the limited time at my disposal, I am not able to state that this is the strict relation existing. The owner of the bond has no right or recourse against the individual lot owners. In other words, it has no right to go back of the so-called trustee, the city of Columbus, and demand that the real parties in interest be compelled to pay these bonds. On the other hand, it is clear that the obligation is one strictly and exclusively between the city of Columbus and the persons from whom it has borrowed money. It is within the power of these bondholders, if they desire, to donate to the city not only a lower rate of interest, but, as has been done I believe in one case, the party may donate by will all of his bonds to the city, and the benefit is that of the city alone. The city it might well be claimed can not speculate upon the property owners, nor commit any such act as would be either constructive or actual fraud upon them, nor use the property owners for the purpose of private gain, but the incidental benefits or losses which must result in the ordinary transactions of good business between the city and its bondsmen must accrue to or fall upon the city.

The property owner is not required to pay the city 6 per cent. interest on the assessment. They may, if they can get a better rate of interest elsewhere, pay the street assessments off in full, and by that act thereby compel the city of Columbus to continue to pay interest to its bondholders, however unwilling it may be to do so. In other words, if, after issuing a series of bonds for ten years for the improvement of a street, all the property owners would pay at once the full amount of the assessment, the city of Columbus would be compelled to carry that money whether it had any use for it or not until the time limit stated in the bonds, as they can not force them to take the money beforehand. In other words, the relation between

the city of Columbus and the bondholders is one thing and the relation of the city to the property owners is another.

If the city had sufficient money in its treasury lying idle it might make these improvements under a law authorizing the same, and issue no bonds at all, and pay, therefore, no interest at all, and yet I can conceive how the act would be perfectly valid which would require property owners to pay the legal rate of interest upon their deferred payments. It is merely a form of accommodation to the property owners and not a matter of right on their part to have time in which to pay it.

I have not considered whether or not in case this question should be properly decided, it should in the manner attempted to be raised in this case, but have given my opinion on it as above stated.

The judgment, therefore, in this case will be in favor of the defendant. Exceptions will be noted for the plaintiffs and appeal bond fixed at \$100.

George B. Okey and *F. A. Davis*, for plaintiff.

J. M. Butler, for defendants.

1905.]

In re George D. Polly—Habeas Corpus.

REGULATIONS PERTAINING TO REQUISITION.

[Common Pleas Court of Hancock County.]

**IN THE MATTER OF THE APPLICATION OF GEO. D. POLLY FOR
WRIT OF HABEAS CORPUS.**

Decided, May, 1905.

Extradition and Requisition—Signing of Warrant in Blank—Validity of, Dependent on What—Sufficiency of the Affidavit—Failure to Comply with Regulations to the Letter.

1. The fact that the warrant for the arrest of one wanted for extradition was signed by the governor in blank is immaterial, if it appears that the governor directed that the warrant issue; and where the direction is given by telephone, it is without significance whether the governor is one mile or one thousand miles from his office at the time it is given.
2. A warrant is properly issued where the affidavit which accompanies the requisition states positively the facts constituting the offense.
3. Section 95, Revised Statutes, only provides regulations for the governor, and does not confer or limit jurisdiction, and is in no sense mandatory.

DUNCAN, J.

The complainant is in the custody of the sheriff of this county, under warrant of the governor of Ohio commanding him to arrest said Polly and bring him forthwith before this court for direction as to whether he shall deliver him to one Geo. A. McArthur, as agent of the territory of Oklahoma, for extradition to that territory under requisition of its governor.

The complainant says that said warrant was signed in blank by the governor and issued by his executive clerk during his absence from the state. The fact that said warrant was signed by the governor, the presumption is in favor of the regularity of its issue, and that he signed it after it was prepared. Evidence which the court held to be incompetent for the purpose tended to show that said warrant was signed by the governor in blank and directed to be issued by him in person—over the long distance telephone—from New York city, as the result of

a conference had with him by his executive clerk for that purpose. It will hardly be claimed that the warrant would not be good, though signed in blank, if the governor were present in his office and had then and there directed the same to issue. What difference could it make if that direction was given by the same voice to the same person in the governor's office carried over a wire one or a thousand miles long?

Was authority given for its issue, would seem to me to be the test, and that has been satisfied by the evidence in this case, even though I would consider all the evidence offered by complainant upon this issue.

It is also said that said warrant was improperly issued because the requisition of the governor of Oklahoma was not accompanied by affidavit or affidavits of the facts constituting the offense charged by some person having knowledge thereof, and Section 95 of the Revised Statutes of Ohio, is cited as providing for this requirement.

In answer to this it may be said that matters of extradition are between the states; are secured by the Constitution of the United States and are provided for by the federal statutes. Article IV, Section 2, Par. 2 of the Constitution of the United States reads as follows:

“A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.”

The provisions made by Congress for the prosecution of this right and the exercise of this power is found in Section 5728, Revised Statutes of the United States, which reads as follows:

“Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so

1905.]

In re George D. Polly —Habeas Corpus.

charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."

This is a statute of the general government, and, when strictly followed, should control. It would not do to hold, as contended by counsel, that the least variance from a state statute, after jurisdiction has attached under the federal law, that the prisoner should be discharged at all hazards. If Section 95, Revised Statutes of Ohio—the whole of it—applies to this case, substantial compliance with it is all that is required. To hold otherwise, would make the extradition laws of Ohio of impractical operation. Each state has made its own requisition laws, laying down conditions under which requisition may be made upon governors of other states, as the federal statute makes no provision in that behalf. The federal statute makes provision for *extradition*, but not for *requisition*.

Now, upon the question of the affidavit. In the case in 3 N. P.—N. S. (*Thomas v. Evans*), and also in one in 63 Fed. Rep., 249 (*Ex parte Hart*), the affidavits were sworn to according to belief only—"as he verily believes." Both these courts hold that this was not sufficient, and that was all there was in either of those cases, and was all that was really decided, and this was decided right. In the case at bar, the affidavit was made stating the facts positively constituting the offense, and while it is not stated that affiant had personal knowledge of the facts, the absolute statement which he makes would seem to so indicate, and especially so as the affiant is the injured party and would probably know. Because the offense is charged absolutely, I think the affidavit strictly satisfies the provisions of this Section 5278, of the federal statute in this behalf, as well as

substantially complies with the provisions of said Section 95 of the Revised Statutes of Ohio.

But whatever may be said of the want of strict compliance with said Section 95, it is certain that said section only provides regulations for the direction of the governor, does not confer or limit jurisdiction, and is in no sense mandatory. Said Section 5278 of the federal statutes confers the jurisdiction and sets out the circumstances and conditions under which it may be exercised, and when the conditions of this section are satisfied, jurisdiction has attached, and it is then up to the governor to say whether or not he will issue the warrant while some state regulation has not been fulfilled to the letter.

The other objection, to-wit, that the affidavit charging the complainant here with the crime of grand larceny was not authenticated by the governor of the territory of Oklahoma would be good if true, and would compel me to discharge the alleged fugitive under the writ. But the executive clerk of the governor of Ohio has not only certified that this certificate of the governor of Oklahoma was filed with the governor of Ohio, upon the making of said requisition, but the last mail from the capital has brought from the governor's office a certified copy of such certificate.

All the contentions urged for the discharge of the complainant having been disposed of, and holding the views which I have expressed, it follows that the writ must be denied and the petition dismissed.

Franks & Franks and *McConica & Dwiggins*, for complainant.

Phelps & David, for respondent.

NOTE.—Judges Vollrath and Hurin, of the third circuit, sitting at chambers, refused to stay proceedings upon this record.

ADVERSE POSSESSION AND CO-TENANCY.

[Common Pleas Court of Franklin County.]

SAMUEL S. CHAMBERS v. ALFRED C. WILCOX ET AL.

Decided, January 16, 1905.

Limitation of Actions—Can not be Pleaded in a Suit to Quiet Title, When—Statute Begins to Run in Favor of Tenant in Common, When—Tenant in Common Must Assert Exclusive Ownership, How—Quit-Claim Deed Passes After-Acquired Title in Partition Cases—Peaceable Settlement of Disputed Titles—Pleading—Policy of the Law.

1. The statute of limitations can not be successfully pleaded as a defense to a petition to quiet title, which contains only the allegations required by Section 5779, Revised Statutes; but with respect to a cause of action which plaintiff voluntarily sets forth in his petition, the statute may be pleaded in defense.
2. The statute of limitations does not begin to run in favor of a tenant in common in possession until some overt act takes place, which unmistakably indicates an assertion of ownership of the entire premises to the exclusion of the rights of the co-tenant.
3. Where quit-claim deeds are given for the sole purpose of effecting a partition, an exception is made to the general rule as to after-acquired title in real estate, and such deeds will be treated as containing an implied covenant that the grantor owns the premises conveyed.
4. It being the policy of the law to encourage peace and the peaceable settlement of disputed titles, the fact that the plaintiff in an action to quiet title obtained a quit-claim deed from one of the defendants will not be held to raise a presumption of an acknowledgment of a co-tenancy.

DILLON, J.

One Alfred Wilcox died some time prior to 1858, seized of about one hundred and twenty-four acres of land in this county, leaving four children his only heirs, to-wit: One son, John L. Wilcox, and three daughters, Harriet I. Hoffman, Jane A. Tip-ton and Emily Detweiler.

On May 17, 1858, Harriet I. Hoffman and her husband quit-claimed their one-fourth interest to their brother, John L., and thereby he became the owner of the undivided one-half.

1906.]

Chambers v. Wilcox et al.

On October 30, 1858, John L. Wilcox and his wife and Emily Detweiler and her husband deeded their three-fourth interest in thirty-seven acres of the property off the east side thereof to William W. and Jane A. Tipton.

On November 6, 1858, John L. Wilcox and wife deeded his one-half interest in the remaining eighty-seven acres to Abraham Detweiler, the husband of Emily.

On May 8, 1865, Jane A. Tipton and her husband conveyed all their title in the eighty-seven acre tract to four grantees, to-wit: John L. Wilcox and Ester F. Wilcox, his wife, Abraham Detweiler and Emily, his wife.

Prior to this last-named deed, it will be observed that Emily still owned her undivided one-fourth in the eighty-seven acres, and her husband had acquired in his deed the undivided one-half thereof from John L. Wilcox. By this deed of Tipton and wife, however, to Detweiler and his wife and to John L. Wilcox and his wife, he conveyed to each one of the said parties an undivided sixteenth, so that by this deed the legal title stood as follows:

John L. Wilcox owned an undivided one-sixteenth; Ester F. Wilcox one-sixteenth; Emily Detweiler five-sixteenths; Abraham Detweiler nine-sixteenths.

It is at this point that the controversy in this case has its start, because as has already been observed, although John L. Wilcox and wife, by their deed of November 6, 1858, had quit-claimed all their title to Detweiler, yet this last-named quit-claimed deed placed back in John L. Wilcox and his wife each a one-sixteenth undivided interest, so that Detweiler and his wife together only owned an undivided fourteen-sixteenth of this property.

The plaintiff in this case derived his record title from Abraham and Emily Detweiler, through a rather numerous succession of subsequent owners, and therefore, so far as the record title is concerned, there has during all these years remained outstanding an undivided two-sixteenths part in John L. and Ester F. Wilcox and their heirs.

While the said Abraham Detweiler and wife did not personally live upon the real estate in question, they lived near thereto, and occupied the same as owners exclusively, exercising all the prerogatives of owners, paid the taxes thereon, rented the same and collected rents. After Abraham's death his widow and children continued so to possess and occupy said real estate until by their deeds it passed to their successor in title and the various successors in title and have so continued to hold and occupy the real estate up to the present time. The defendants here are two of the three heirs of the said John L. and Ester Wilcox, the third heir having quit-claimed his interest to plaintiff. The petition makes the usual allegations as provided in Revised Statutes, 5779, for the purpose of quieting title to said real estate, and also in the same petition asserts that the insertion of the names of John L. and Ester Wilcox, as named in the quit-claim deed from Tipton and wife, was error and asks its correction.

The separate answers and cross-petitions of the defendants consist of a general denial of any error in said deed to John L. and Ester, and by cross-petition ask for partition of their respective interest in the realty, each claiming the undivided one-twenty-fourth therein; the answers further plead the statutes of limitation of twenty-one years under Revised Statutes, 4977, of four years under Revised Statutes, 4982 and of ten years under Revised Statutes, 4985, *i. e.*, "actions not heretofore provided for."

From the very nature of a pure and simple petition under Revised Statutes, 5779, to quiet title, and which petition does not attempt to set forth any other purpose, cause of action or demand, it follows that none of the statutes of limitations apply nor can they be successfully pleaded against such a petition. This follows because a petition of this character does not purport to assert a cause of action but is a special proceeding whose object is to challenge and provoke any causes of action which may exist in the premises, and by which it may be claimed some outstanding title or right exists in the defendants as to the real estate under consideration. As to these causes of action thus provoked, and the defenses or counter-actions of plaintiff, the

statutes of limitations may be properly invoked. In the case at bar, therefore, the court considers the plea of the statutes of limitations as to the petition to apply only to that cause which the plaintiff has voluntarily set forth in his petition, to-wit: That the name of John L. and Ester in the deed of 1865 was error, and the prayer for the correction of same may be considered by the court. But there is a question in my mind whether or not such a plea can be made because of the saving clause of Revised Statutes, 4974, which provides that none of the statutes of limitations shall apply "to an action by a vendee of real property, in possession thereof, to obtain a conveyance of it."

Leaving this question open it is apparent that so far as naked legal title is concerned, the parties are tenants in common. The plaintiff, however, relies on two propositions:

First. The continuous adverse possession of himself and those under whom he claims for the entire period since 1865.

Second. That the evidence shows that the deeds were purely partition deeds and that therefore the rule that a prior quit-claim deed will not convey after-acquired realty does not apply, but that in such cases as this a covenant will be implied by law in the first deed for the attainment of justice.

In the case of deeds exclusively for partition, and where no other considerations are involved, the law for the enforcement and attainment of justice makes an exception to the usual rule for partition purposes, and such deeds of quit-claim will often be treated by the courts as containing a covenant implied by law, so as to carry with any after-acquired title in the real estate first conveyed, but I do not think there is sufficient evidence before the court to warrant this court in finding that the various deeds of quit-claim in this case, many of which I need not mention, were purely partition deeds, but on the contrary there is much evidence that some of the quit-claims were the direct result of bargain and sale. The plaintiff's claim therefore must rest upon his first proposition. It is well settled that the statute of limitation does not begin to run in favor of one tenant in common who is in possession, because in such case the act of possession of one tenant is not inconsistent with his rights in the prem-

ises of his co-tenants. Nor will adverse possession be recognized as existing between tenants in common, until some overt act or acts take place of an unequivocal character "clearly indicating an assertion of ownership of the entire premises to the exclusion of the right of the co-tenant." *Youngs v. Heffner*, 36 Ohio St., 232.

Such overt act or acts must be so unmistakable that the co-tenant must have had or ought to have taken notice that the tenant in possession claimed the entire ownership. *Hogg v. Beerman*, 41 Ohio St., 81.

In the case at bar the evidence shows that John L. and Ester Wilcox did nothing with respect to any act of ownership. The Detweilers continued to occupy and use the real estate—it was on the tax duplicate in his name. The Detweilers paid the taxes. There is no evidence that they ever paid any rent to Wilcox or to his wife or that any other acts took place between them indicating joint ownership.

John L. Wilcox died about five years after this deed, his wife having died before he died. After their death there was no change with respect to the real estate on the part of his estate or heirs. Upon the death of Abraham Detweiler, his heirs, in 1880, by a deed duly recorded conveyed the premises to the widow, Caliste Emily Detweiler, this deed being recorded about the month of September, 1880. Caliste Emily continued in possession and occupancy of the real estate in the same manner as her husband until October 10, 1890, when by warranty deed she conveyed a part thereof to a predecessor of the plaintiff and subsequently conveyed the remainder of the real estate to a predecessor in title to this plaintiff.

John L. Wilcox was more familiar perhaps with this real estate and more active in its control after the death of his father than any of the other heirs, as he was the only son.

The evidence satisfies me that each party has from the beginning treated this property and the title thereof in exactly the same manner, to-wit: The Detweilers have treated it as their exclusive property, and Wilcox and wife and their heirs after their death, have treated it in the same manner. For this reason,

1905.]

Chambers v. Wilcox et al.

therefore, there has never been any particular declaration of Detweilers or their successors in title to the Wilcoxes or their heirs.

There seems from their mutual treatment of it to have been no necessity or cause of any particular assertion or demand in regard to that, concerning which there was evidently no dispute. The impression must be gained from the evidence that from the date of the Tipton deed, the Detweilers thought, believed and acted as if they owned the property, and Wilcox and his wife thought so too. The object of the law in establishing of title by adverse possession is the necessity for repose, a situation, with reference to real estate which is thus favored. The reason of the rule which requires acts as clearly indicating an assertion of ownership in the entire premises by a tenant in common is self-evident. To what extent and in what manner one tenant must thus assert by his acts or declarations, and declare his exclusive ownership, is not to be determined by any particular or fixed line of conduct, acts or declarations, but must be determined as a matter of law from the particular facts of each case. Even long lapse of time such as has existed in the case at bar may be one fact to be considered by the court as indicating whether or not the possession has been adverse.

It might be sufficient under all the facts of this case to base the running of the statute from the time of the Tipton deed itself, because the evidence, including all the prior quit-claim deeds, satisfies me that John L. and Ester themselves treated this after-acquired fractional two-sixteenths as having been previously conveyed away by them to Detweiler and wife, and from that day they knew and believed that the Detweiler ownership was exclusive in the entire tract. Again we have a direct and positive assertion of exclusive ownership in the deed of September 13, 1880, whereby the Detweiler children conveyed a portion of this property to their mother.

It is claimed by the defendants that by reason of the fact that the plaintiff herein obtained and accepted a quit-claim deed from one of the other heirs of John L. and Ester that as a matter of law this presumes an acknowledgment of co-tenancy. That there may be cases and circumstances where such an act might be evi-

1905.]

Chambers v. Wilcox et al.

dence of acknowledgment of the existence of co-tenancy may be granted. But I can not adopt such ruling in this case; on the contrary it is the policy of the law to encourage peace and peaceable settlements of disputed titles.

The court, therefore, would never establish a rule of presumption from such an act. It is not only a right and privilege of any person to purchase his peace from one who has no claim or title, but the law would incline to look with favor upon settlements which the parties might make between themselves. To announce a different rule would be to discourage every act of settlement or compromise and seek to prevent the parties from thus settling their own disputes. To do so would be the establishment of a rule of presumption against them.

The view here entertained requires me to grant the relief prayed for by the plaintiff and a decree may be drawn accordingly. The defendants' exceptions are noted and the appeal bond fixed at \$100.

Charles Aubert and L. D. Lilly, for plaintiff.

McNeal & Sons and Johnson & Johnson, for defendants.

CONSTRUCTION OF THE PHRASE "SEVENTH DAY OF THE WEEK."

[Common Pleas Court of Franklin County.]

SAMUEL ROSEN V. THE STATE OF OHIO.

Decided, March 13, 1905.

Sunday Laws—Exemption Extending to Those Who Observe the Seventh Day—Under the Statute Forbidding Transaction of Business on Sunday—Seventh Day Begins, When.

Inasmuch as the proviso in Section 7033, prohibiting the transaction of business on Sunday, was intended to embrace those who observe the seventh day, it should manifestly be given a construction which will cover the period of time commonly observed as the seventh day, or Sabbath, which begins with the appearance of the stars on Friday evening and ends at the same time on Saturday evening.

DILLON, J.

Error to the police court of the city of Columbus.

The plaintiff was convicted in the police court for violating Section 7038, Revised Statutes Ohio, which forbids the transaction of business on the first day of the week, commonly called "Sunday."

The plaintiff in that court claimed exemption from its operation by reason of the clause of said statute which expressly provides that the statute shall "not extend to persons who conscientiously observe the seventh day of the week as the Sabbath, and who do, in fact, abstain on that day from the doing of the things herein prohibited on Sunday."

The evidence shows that the plaintiff in error is an orthodox Jew, and, as such, while he did keep his place of business open on Sunday, as a matter of fact, he did in good faith abstain from any such work, and did observe as his Sabbath a period of twenty-four hours commencing as soon after sun down as the stars appeared on Friday evening and ending at the same time on Saturday evening.

1905.]

Rosen v. State of Ohio.

The point in contention here is that this does not comply with the exceptions of the statute, but that in order to avail himself of this exception, a person must abstain the entire seventh day, to-wit, from midnight of Friday night until midnight of Saturday night.

The question, therefore, to be decided is what the Legislature meant in its use of the expression "seventh day of the week as the Sabbath." The word "day" does not have any fixed and determined meaning, but its meaning must be determined always by the subject-matter. In an astronomical sense, it is the space of time in which the earth makes one revolution upon its axis. In its fullest sense, it means the time from one midnight to the next midnight, that having been a convenient time adopted to divide one day from another. Again, it is often used in the popular sense of defining the time between sunrise and sunset as distinguished from night. It is also used in a more conventional sense as embracing only those hours which are sufficient for the discharge of one's work. And thus a man who agrees to work so many days at so much per day, will be expected to work the number of hours, to-wit, seven hours, eight hours, nine hours, or ten hours, as may be the custom with reference to that kind of work.

Even more restricted is the construction of the word "day" when it is used with reference to the payment of a note at a bank. The law gives such a person only that part of the day up to the close of banking hours, and thus such a day would end at about two or three o'clock in the afternoon.

The question, therefore, must not be arbitrarily determined by construing the word "day" as meaning from midnight to midnight, unless from a full consideration of the statute and its objects, that is the meaning and intent of the use of the word.

While it is true that legally considered, our Sunday act is a mere civil regulation having no connection with religion, and founded on principles of public policy alone, it nevertheless is most apparent that that particular day selected by the Legislature to enforce that salutary observance of one day of rest weekly, is the day most generally accepted by the large

majority of our citizens by reason of religious as well as civil custom as their day of rest.

The establishment of these days of rest is most ancient and is said to be even more ancient than Jewish and biblical history. There was such a day known and well established among the Babylonians, among the Semitic-Assyrians, and even among the aboriginal tribes of Chaldea. The enforcement, however, by law of the observance of the first day of the week, commonly called Sunday, might subject the statute to the weakness of unconstitutionality unless it exempted from its operation those persons who conscientiously observed the seventh day of the week as the Sabbath. This was held in our own state in the case of *City of Canton v. Nist*, 9 Ohio St., 439, with reference to a city ordinance, in which an ordinance of the city of Canton, without such exception, was declared null and void.

A similar ordinance of the city of Cincinnati was held void as to those who conscientiously observed the seventh day of the week as the Sabbath, in the case of *The City of Cincinnati v. Rice*, 15 Ohio, 225.

In the case of *People v. Bellet*, 99 Mich., 151, the Supreme Court of Michigan upheld an act similar to the statute of Ohio, upon the theory that said act did not grant to any citizen or any class of citizens, privileges or immunities which did not belong equally to all citizens, but that the framers of the statute meant to leave it to the consciences and judgment of its citizens to judge between the first and the seventh day of the week, requiring only that on one or the other of these days they must refrain from any labor.

What then is the meaning of the seventh day of the week? The Legislature clearly had in mind two and only two classes of citizens. The Legislature found no other class of citizens whatsoever which needed any consideration by virtue of the constitutional privilege guaranteeing liberty of conscience and worship. These two classes consisted, first, of those who conscientiously observe the first day of the week as a day of rest, and all other persons who had no conscience in the matter whatever. The second class consisted solely of those who conscientiously observe the seventh day of the week as the Sabbath.

1906.]

Rosen v. State of Ohio.

The word "Sabbath" is from the Hebrew "*Shabbath*" and signified a "rest from labor." It is mentioned first in Genesis ii. 2, 3, as the "seventh day." It is mentioned in Exodus xvi. 23 as the "holy Sabbath," and again in Exodus xx. 8, as a day to be kept holy.

From the beginning of the history of these people, *i. e.*, Jews and Seventh Day Adventists, who have observed the seventh day to keep it holy, that day has * * * commenced at starlight upon Friday evening, and ended at starlight upon Saturday evening. This custom of the use of the word "Sabbath day," and of its beginning and end, arose from the account of the creation of the world, beginning with Genesis i. 5, where after the long period of darkness and chaos, there was light. "And the evening and the morning were the first day." And so on was each day numbered as the evening and the morning, until the seventh day, and this last evening and morning, *i. e.*, light following the darkness, was set apart as the day of rest, and has been so observed ever since by these people. It will be observed, therefore, that the statute has direct application to, and was meant to embrace and save from its operation the very people who have thus observed the seventh day, and it is significant that the section of the statute does not only mention the seventh day as a day, but makes this exemption applicable to the day *as the Sabbath*, distinguishing that word "Sabbath" from the other word "Sunday" used in the same act. While it is true that the words "Sabbath" and "Sunday" are often interchangeably used, yet they are not necessarily synonymous. It is the duty of the court, therefore, to so construe this statute that two results will follow: First, that the statute itself be given such a construction as will make it constitutional, and second, that it be given such a construction as will carry out the manifest intent thereof, and exempt from its operation those persons who were intended to be exempted.

In the case of *Johns v. The State*, 78 Ind., 332, the court speaking of a similar statute in that state, says—

"It was not the purpose of the law makers to compel any class of conscientious persons to abstain from labor upon two days in every week. Without the proviso, a large number of

citizens would be compelled to lose two days of labor. * * * A leading and controlling element of our system of government is that there shall be absolute freedom in all matters of religious belief. The statute here under examination is framed in harmony with this all-pervading and controlling principle."

It is self-evident, therefore, that if the meaning of the expression "seventh day as the Sabbath" means from midnight Friday night to midnight Saturday night, the proviso is useless; it applies to no one, and so far as the effect of the statute is concerned, is of no force or effect whatever. Of the manner and time of the worship of the Jews and Seventh Day Adventists, the court takes judicial notice. With such knowledge, therefore, a Legislature must have acted, and intended when they referred to these people and their day of worship.

The conclusion which I have reached, therefore, is that the expression "seventh day of the week as the Sabbath" as used in said Section 7038 means that period of twenty-four hours ending at or about the appearance of the stars on Saturday evening.

The judgment of conviction will be set aside and the plaintiff in error discharged.

F. C. Rector, for plaintiff in error.

C. E. Carter, for defendant in error.

**WHERE THE TESTATOR IS SILENT NO COURT CAN
SPEAK FOR HIM.**

[Common Pleas Court of Franklin County.]

MARY M. REINHARD V. MATILDA H. REINHARD ET AL.

Decided, April 17, 1905.

Wills—Construction of—Limitations of the Court—Where There is no Ambiguity—Intention of Testator—With Reference to a Matter Upon Which He is Silent—Can Not be Shown by Parol.

The rule which permits resort to extraneous evidence to make clear the language used by a testator in his will, does not permit of the adoption of such a construction of the will as would read therein a provision as to which the will is silent, or add thereto a substantial bequest.

BIGGER, J.

This case is submitted upon general demurrers filed by the defendant, Martha M. Reinhard, as guardian, to the answer of Matilda Reinhard and to the reply of the plaintiff, Mary M. Reinhard. In substance these contain averments that by mistake of the scrivener in writing the codicil to the will of Jacob Reinhard, deceased, there was omitted a provision for a life estate to Matilda Reinhard and Mary M. Reinhard in twenty-eight feet off of lot number 15 in Auld's addition. The answer of Matilda Reinhard contains no averments of fact, but only the conclusion of the pleader. The reply of Mary M. Reinhard, however, sets out the fact that the residence property which constituted the homestead and the residence of Jacob Reinhard, Sr., stood upon the twenty-eight feet off of lot 15 except about two feet in width thereof, which extended over on the adjoining lot known as lot 835; that it was the intention of the testator to convey a life estate to Matilda and Mary in the twenty-eight feet and that if the will and codicil do not express the intention and purpose of the testator, which the plaintiff avers does appear from the will and codicil it was through the mistake of the scrivener. These demurrers thus submitted call for a construction of this provision of the will of Jacob Reinhard, deceased.

By item five of the will, the testator devised to Matilda Reinhard a life estate in the twenty-eight feet and also in in-lot 835 and the remainder to his four sons. By the codicil to the will, the testator revokes this item five of his will and substitutes therefor the following:

"I give and devise to my daughters, Matilda H. Reinhard, and Mary M. Falkenbach (that being the then name of the plaintiff) for and during their natural lives in lot No. 835 in Crosby's addition to said city of Columbus. The remainder in fee in said in lot No. 835 in Crosby's addition to said city and the remainder in fee in said twenty-eight feet off of said in-lot No. 15 in said Auld's addition I give and devise to my four sons in my said last will named."

It thus appears that the testator, who originally gave to his daughter Matilda a life estate in both of these lots by item five

of his will, by his codicil which revoked item five, gave a life estate to his two daughters, Matilda and Mary, in but one of them, but provided the estate in remainder in both should go to his four sons. The contention of the plaintiff and Matilda is that by a proper construction of the will it appears that the testator intended to provide a life estate in both lots for them.

Elaborate briefs have been filed upon both sides. After a very careful examination of the authorities cited in connection with the provisions of this will and the codicil I am compelled to reach the conclusion, which I may say I am loath to do, that there is here nothing for the court to construe. There is here no ambiguity. Both item five of the will and the codicil are clear and unambiguous. While the fifth item of the will gave a life estate to Matilda Reinhard in both lots, the codicil gives it to the two sisters in but one. This is clear and unambiguous. No authority has been cited and I have found none, and I do not believe any decision of any respectable court can be found which will authorize a court to add to a will an independent substantive bequest and to make a provision in the will upon which it is silent. It is true it is permissible and resort is often had to extrinsic evidence to make clear the language used by a testator. But when he is silent no court is authorized to speak for him. It is only to make his language plain that a court may undertake to determine his meaning by taking into consideration all the surrounding circumstances. To do otherwise would be to permit a will which the law requires to be executed with great solemnity during the life time of the testator to be made in part at least by witnesses after his death. This, as I understand the law, is under no circumstances permissible. As I say under the peculiar circumstances of this case I am loath to announce this conclusion, but it seems to me there is no other course under the well established principles relating to the subject of construction of wills. The demurrer, admitting as it does that it was the intention of the testator to do this, does not help it. His intention upon a subject upon which he was silent can not be shown by parol evidence. To this effect are all the authorities. For

1905.]

State, ex rel, v. Fiedler, Police Judge.

this reason I am constrained to sustain the demurrers. An exception may be noted.

T. E. Powell, for plaintiff.

J. E. Sater, for defendant.

DUTY OF TRIAL JUDGE WITH REFERENCE TO BILL OF EXCEPTIONS.

[Common Pleas Court of Cuyahoga County.]

THE STATE OF OHIO, EX REL JAMES FORBES, v. WILLIAM F. FIEDLER, JUDGE OF THE POLICE COURT.

Decided March, 1905.

Bill of Exceptions—The Fact that a Bill is Not Correct—Not a Sufficient Reason for Refusal of Judge to Sign—Mandamus to Compel Signing—Purpose of the Bill—Duty of the Trial Judge

1. In a mandamus proceeding against a judge to compel him to sign a bill of exceptions, an answer to the effect that the bill presented is not a true bill does not state a sufficient defense, but the answer should show willingness and effort on the part of the judge to perfect the bill.
2. Where the answer does not show a disposition on the part of the judge to sign a true bill of exceptions, or to correct or assist in the correction of a bill which is imperfect or untrue, mandamus will lie to compel him to sign and settle a bill.

FORD, J.

This is an action in mandamus. The petition reads as follows:

"Your relator, James Forbes, says: That the defendant, William F. Fiedler, is the duly elected and qualified police judge of the police court of the city of Cleveland, Ohio, and that he has been such judge during all times mentioned in this petition.

"Your relator avers that in an action pending in the said police court at the February, 1905, Term thereof, he was tried on an information charging him with violation of ordinances, Section 711 and 712 of the city of Cleveland, and the jury in said case returned a verdict against him of guilty as charged;

that the said William F. Fiedler, prior to the trial of said case, had duly qualified and entered upon the discharge of his duties as one of the judges of said court, and in the discharge of said duties presided as judge of said police court during the trial of said case. That during the progress of said trial the said relator took numerous exceptions to the rulings of the said William F. Fiedler, as such judge, but in order that the trial of said case might progress as rapidly as possible, consented that said exceptions might consequently be reduced to writing and allowed and signed by said William F. Fiedler, as such judge, and by him ordered to be made a part of the record in said case. And the said relator, on the 6th day of February, 1905, duly excepted to the overruling by the said William F. Fiedler, as such judge, of the relator's motion for a new trial in said case, and then and there desired and requested the said William F. Fiedler, as such judge, to allow this relator ten days in which to prepare and file a bill of exceptions, which was by the said judge then and there done.

"That afterwards, to-wit, on the 8th day of February, 1905, this relator, having finished and completed a true bill of exceptions in said case, which said true bill is herewith presented, attached hereto, and marked Exhibit 'A,' tendered and presented the same to said William F. Fiedler, as said judge, and prayed the said William F. Fiedler, as such judge, to allow and sign the same and order the same to be made a part of the record in said case; and the said William F. Fiedler on the 16th day of February, 1905, arbitrarily, unjustly and without just cause, refused to sign, allow and make a part of the record said true bill of exceptions.

"That the said William F. Fiedler, judge of the police court, as aforesaid, on said date and now, arbitrarily, unjustly and for the sole purpose of defeating this relator's right to proceed in error in said case, refused and now refuses to sign and allow said true bill of exceptions; that the said William F. Fiedler, fearing that because of his erroneous rulings and charge to the jury during the trial of said case, the judgment rendered by him in said case would be reversed and said erroneous and unjust rulings be exhibited to the view of this court, refused to so sign and allow said true bill of exceptions.

"This relator further says that as a pretense for an excuse to refuse to sign and allow said bill of exceptions, the said William F. Fiedler declared, without any reason therefor, that said bill of exceptions so tendered to him was incorrect, and arbitrarily, unjustly and with the sole purpose in view to defeat this relator's right to proceed in error, refused and still

1905.]

State, ex rel, v. Fiedler, Police Judge.

refuses to point out said alleged error, and in a high-handed and despotic manner refused to correct the same or give this relator any opportunity to correct the same.

"That this relator has offered to permit said William F. Fiedler to correct and change in any manner he might desire, or make any changes which he might indicate in said true bill of exceptions, but he absolutely and imperiously refused in any way to indicate said alleged error in said true bill of exceptions or to correct it.

"This relator further avers that at the present time he is imprisoned in the Cleveland workhouse at hard labor, and the said William F. Fiedler in defiance of law and the rights of this defendant refuses to sign said true bill of exceptions, and this relator has no remedy at law.

"Wherefore, this relator prays that a writ of mandamus may be issued to compel said William F. Fiedler, as said judge, to allow, sign and make a part of the record said true bill of exceptions; or to correct, settle, allow, sign and make the same a part of the record; that a peremptory mandamus be directed to said William F. Fiedler, as said judge, and that this court impose a fine not to exceed five hundred dollars (\$500) on said William F. Fiedler, as provided by Section 6756, of the Revised Statutes of Ohio, for his refusal, without just excuse, to sign and allow said true bill of exceptions, and for such other relief to which he may be entitled."

The defendant makes the following answer:

"The defendant for his answer says that he was and is one of the duly elected and qualified judges of the police court of the city of Cleveland; that he presided at the trial of said relator, who was charged with being a suspicious person and tried on same at the February, 1905, Term thereof; that sundry exceptions to the ruling of the court were taken during said trial of said relator; that the said relator had been convicted of said charge and that a motion for a new trial had been filed by said relator; that a bill of exceptions was filed in said cause and that he, the said William F. Fiedler, was requested by said relator to sign and seal the same, but the defendant denies that the said bill of exceptions was a true and correct bill of exceptions, and the said defendant avers and says that the bill of exceptions which the relator requested him to sign and seal did not contain a true statement of the facts and its allegations are untrue and colored, for which cause he, the said William F. Fiedler, refused to sign and seal the same."

The question to be determined is this: Should a peremptory writ be allowed?

The defendant is one of the judges of the police court of the city of Cleveland, which court is an inferior court and as such the subject of bills of exceptions has to do with Section 6565 of the Revised Statutes, which reads:

“That in all cases before a justice of the peace, mayor or police judge, whether tried by jury or the justice, mayor or police judge, either party shall have the right to except to the decisions of the justice, mayor or police judge, upon any matters of law arising in the case. The party objecting to the decision must except at the time the decision is made, and time shall be given to reduce the exceptions to writing, but not more than ten days nor less than five days beyond the date of overruling the motion for a new trial, if such motion be made, or from the date on which the decision of the justice, mayor or police judge, is rendered.

“When the decision objected to is entered on the record and the grounds of the objection appear in the entry, the exception may be taken by the party causing the same to be noted at the end of the entry, that he excepts, but when the decision is not entered on the record or the grounds of the decision do not sufficiently appear in the entry, or exception is to the decision of the court on a motion to direct a non-suit, or to arrest the testimony from the jury, or for a trial, because the verdict, or if a jury is waived the finding of the court, is against the law and the evidence, or on the admission or rejection of evidence, the party excepting must reduce this exception to writing and present the same to the trial justice, mayor or police judge, or his successor, within the time herein limited, and if the same is correct, he shall sign said bill of exceptions and file the same with the papers in the case, and note such signing and filing in his docket, and transmit the same with the transcript of his docket and original papers, within ten days of the date of such signing, to the clerk of the court of common pleas and by him filed and entered upon his trial docket as in other cases. The party demanding such transcript shall, if required, pay the fees of the justice, mayor or police judge, therefor in advance.”

A feeling has grown up that a justice of the peace or a police judge under the provisions of Section 6565, Revised Statutes, might answer that the bill of exceptions tendered was not a

1905.]

State, ex rel, v. Fiedler, Police Judge.

true bill of exceptions, and that he was ready to sign a true bill, which answer would constitute a good defense against an application for a writ of mandamus. In other words, that these officers were not called upon under the statute to settle the bill of exceptions, not called upon to make suggestions to counsel nor to participate or take any part in the framing or preparation of such bill.

In most of the decisions in this state that I have examined the petition in mandamus has asked to have *the* bill of exceptions, that is, the particular bill of exceptions, attached to the petition in mandamus, signed, and most of the cases seem to have gone off upon the theory that plaintiff, asking to have that particular bill of exceptions signed and the defendant answering that the particular bill was not a true bill, made a good defense. A somewhat different case is presented in this action. The petition recites that application was made to the judge to sign "a" bill of exceptions; that he arbitrarily and without just cause and without assigning any excuse or reason, refused to sign said bill of exceptions; refused to point out to counsel in what respect the bill of exceptions was not correct; refused to correct the same; refused to make suggestions to defendant's counsel, and refused to give relator an opportunity to correct same; that the relator had offered to permit defendant to correct and change in any manner he might desire, or that relator would make any changes which defendant might indicate, but that he absolutely refused to indicate said alleged error in said true bill of exceptions or to correct it.

It is probable that the learned judge below, relying upon a number of decided cases in this state, that it was a sufficient defense in a mandamus proceeding in answer that the bill was not a true bill, and inferring therefrom that a judge had no further duty in the premises, contented himself with the answer to plaintiff's counsel that the bill was not a true bill, and declined to participate in settling the bill or to make suggestions in reference thereto. We think that under the settled law in this state and elsewhere the answer made in this case is not sufficient to meet the allegations of the petition.

Section 3, on page 211, of Powell on Appellate Proceedings, says:

“The object of a bill of exceptions is to bring into the record the point wherein the judge is supposed to have erred, which the record would not otherwise show. If the point already fully appeared in the record, the bill of exceptions is entirely unnecessary. It is intended to raise a question of law upon a single point in the case, arising out of the proceedings which otherwise would not appear in the record and not to bring in review the merits and evidence of the whole case, as in cases of appeals, but bringing into the record, by means of such bill, a concise statement of the facts upon which such point of law is dependent, and the decision of the court thereon. This is done, not for the purpose of any effect that such bill of exceptions may have in the same court, but to lay the foundation for proceedings in error, upon the point of law raised by it, if at some future time it should be thought advisable to prosecute such proceedings in error.”

Section 4 says:

“The bill of exceptions is a statement in writing of the objection made by the party to the decision of the court on a point of law, clearly stating the objection, with the facts and circumstances upon which it is founded; which to attest its accuracy, is signed and sealed by the judge or court who made the decision. This is done for the sole object of putting the question on the record; and when the question fails of being properly brought upon the record to manifest the error, the bill of exceptions is of no account, and has no influence on the case. The English statute, above alluded to, provides that ‘when one is impleaded before any of the justices, alleges an exception praying that they will allow it, and if they will not, if he that alleges the exception writes the same, and requires that the justices will affix their seals, the justices shall do so, and if one will not, another shall; and if, upon complaint made of the justice, the king cause the record to come before him, and the exception be found upon the roll, and the plaintiff show the written exception, with the seal of the justice thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal, and if he can not deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed.’ The principle of this statute has been adopted either by statute or practice in almost all the United States, where the course of practice is in

1905.]

State, ex rel, v. Fiedler, Police Judge.

accordance with that of the common law. It is the case in Ohio, both in civil and criminal matters.”

Section 5 reads:

“In theory, the party or his counsel, in taking the bill of exceptions, is bound to prepare and draw up the bill, stating accurately the necessary facts of the case upon which the point of law depends, with the decision of the court thereon, to which the exception is taken; and in case the same is not true, the judge may allege that reason for not signing and sealing it. But in practice, the judge, whenever the bill is drawn up with any fairness and truth, will amend the bill to conform with his understanding of the facts or evidence upon which the question depends, or suggest such amendments, and when made right, sign and seal it. It then becomes a part of the papers of the case from which the final record is made up, and it is as much a part of the record as the writs and pleadings.”

It is true, no doubt, that the judge is not required to prepare the bill of exceptions. It is doubtless true that he is not called upon to take any important part in its preparation, but a party before the court is entitled to have any exceptions that he may have taken to the rulings of the judge tried in a higher court. The statute gives him this right, and under such circumstances it is, it seems to me, perfectly manifest that it is the duty of the judge to reasonably assist in carrying out the purposes of the statute in this respect. It is the duty of the judge to assist the litigant before him to the enjoyment of this right as much as it is his duty to protect him in any other right that he may be asserting in such a court. Judges are elevated to the bench, in theory at least, on account of their learning and probity, but it is their duty to exercise the office with humility, and they should manifest an entire readiness to have all their rulings tested by courts above them in authority. To this end the judge should render such reasonable assistance as is necessary to perfect a bill of exceptions. The judge has advantage enough in the fact that the power lies with him finally to determine what is the true bill of exceptions. If he is lacking in probity or actuated by revenge, he occupies a position to do great harm to litigants, and on the presentation of a petition

such as is before the court now, the answer should show the degree of willingness and effort to perfect the bill of exceptions just indicated.

Section 20, page 244, Powell on Appellate Proceedings, reads as follows:

“Originally it was supposed that the judge was only bound to sign the bill when a true one was presented to him; and where there was any objection to it, he was not required to aid in its correction, and might, therefore, refuse to sign it. But the practice has for a long time been otherwise, as has been stated. In conformity with this practice the Ohio Code of Civil Procedure provides, that ‘the party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the term.’ ‘The party excepting must reduce his exception to writing, and present it to the court for allowance. If true, it shall be the duty of a majority of the judges composing the court to allow and sign it. If the writing is not true, the court shall correct it, or suggest the correction to be made, and it shall then be signed.’ The judge, therefore, has no right to reject it because he may say it is untrue, but must either amend it, or suggest the necessary amendment, and can only reject, when such amendment is refused to be made.”

Note, also, Sections 34 and 35, page 235, by the same author:

“Section 34. It is the duty of the judge who tried a case to sign the bill of exceptions, when properly presented to him, as has been stated, and to use his endeavors to make it a true and fair statement of the intended point in controversy. If the bill presented is not truthful and fair, he should alter it and make it such, or suggest what alteration should be made, when such alteration can be made in the draft, or when necessary, may require it to be re-drafted in accordance with such suggestions; for he is not bound to sign a bill that is not true.

“Section 35. But if a true bill of exceptions be presented in due season, upon a matter excepted to at the proper time, and the judge refuses to allow, sign and seal it, he may be compelled to do so by a writ of *mandamus*; besides he would be liable to an action for the injury in refusing and neglecting to perform his duty in that respect.”

“Section 52. The judge is bound in duty to sign the bill of exceptions when presented to him in due time, in case it is

1906.]

State, *ex rel*, v. Fiedler, Police Judge.

true; and if not true, he should correct it, or suggest the correction to be made, and then sign and seal it when so corrected. But if the judge or court should refuse to execute a proper bill of exceptions, the party has a right to compel him to do so by a writ of mandamus. At common law the judge was only bound to sign and seal the bill, when a true one was presented, and, therefore, might excuse himself by saying it was not true; but now by the general practice, and also by the statute in Ohio, it is the duty of the judge, in case he finds it in any particular not true, to correct it or suggest the correction to be made, and allow reasonable time for such correction to be made, and when presented so corrected, should then sign and seal it. Under the former practice it was sufficient excuse for not signing that it was not true; but it is apprehended that now, under the present practice and the statute, it is necessary to show something further as an excuse, as that he suggested certain corrections to be made, in order to make it true, which amendments were refused to be so made, or that the bill of exceptions was not presented in time."

The views just stated seem to be supported by authority in very many of the other states of the Union. In 30 W. Va., 89, it is said:

"A judge is required by the statute to sign a bill of exceptions only on the condition that the truth of the case be fairly stated therein. The statement in the return, not traversed, that these bills do not contain the truth of the case, must be taken as conclusively true in this proceeding. But the duty of the judge is not ended and fully discharged, when he merely refuses to sign a particular bill tendered, on the ground that the truth of the case is not fairly stated therein. He should go further. He should proceed with the aid of counsel to settle the bill and when settled to sign it. Originally it was supposed that the judge was bound only to sign the bill when a true case was presented to him, and when there was any objection to it, that he was not required to aid in its correction, and might therefore refuse to sign it. But the practice for a long time has been otherwise. If the bill presented is not truthful and fair, the judge should alter it and make it such, or suggest what alterations should be made when such alterations can be made in the draft; or, when necessary, he may require it to be re-drafted in accordance with such suggestions; for he is not bound to sign a bill that is not true. If a judge therefore refuse to sign a proper bill or proceed to settle the matter of a

bill objected to, he may in either case be compelled by *mandamus* to act."

The rule in this state seems to me to be clearly expressed by Lane, C. J., in a case reported in 1 Ohio Decisions, Reprint, page 52, where it is said:

"It is not an easy thing to present a case with entire truth by a bill of exceptions, and justice requires of both court and counsel to unite in making it correct. There are reciprocal rights and duties for both. It is the duty of the court to carry into the record, when required, every one of their judicial acts; and it is their right to demand from counsel, that the bill of exceptions shall contain every element which the court assume as the basis of their action. If the court decline to adopt the counsel's draft, common fairness requires of them to point out the cause of refusal, so that objections may be removed, either by an amended draft, or by the introduction of further statements."

As I have indicated, I have no doubt the learned judge below is more than ready to perform his duty under the law, and the order in this case will be to sign and settle a bill of exceptions in accordance with the views above expressed.

Sanders, Cline & Sanders, for relator.

1905.]

City of Columbus v. Columbus Gas Co.

MUNICIPAL EXACTIONS FROM GAS COMPANIES.

[Common Pleas Court of Franklin County.]

THE CITY OF COLUMBUS V. THE COLUMBUS GAS COMPANY.*

Decided, April 17, 1905.

Municipal Corporations—Without Rights in the Streets—Which Can Be Sold to a Gas Company—Exactions for Revenue or for Other Purposes Void—Estoppel.

1. It is not within the powers conferred upon a municipal corporation to exact the condition in bestowing a gas franchise, that the company shall pay a specified sum of money into the city treasury annually for the benefit of the gas and light fund; and this is equally true whether such requirement be regarded as a revenue measure or as a provision to meet the expense of inspection.
2. Inasmuch as a municipality has no rights in the streets which it could thus dispose of, it can not be said to have parted with anything of value on the faith of such a provision, and the doctrine of estoppel does not apply to a gas company making the defense of invalidity of the provision after having submitted thereto for a period of years.

BIGGER, J.

Upon the submission of this case on demurrer to the petition, I decided that it did not sufficiently appear from the petition itself that the requirement of the ordinance granting to the defendant the right to use the streets and alleys of the city, that it should pay annually to the city the sum of four thousand dollars was a revenue measure, to warrant the court in so holding, but that this could only be determined upon a full hearing of the case. Since that decision the case has been heard, a jury having been waived and the case tried to the court. The question, therefore, before the court for determination upon this submission is, does it appear that this requirement that the defendant pay the sum of four thousand dollars annually to the city was for revenue purposes, or a reasonable requirement for inspection purposes and to enable the city to safeguard the

* See *Columbus v. Gas Company*, 2 N. P.—N. S., 277.

public from the dangers incident to the business. It is the claim of the defendant that it appears both from the terms of the ordinance, which was made a part of the petition, and from the evidence offered upon the trial that this was a provision intended for revenue purposes only and not for the purposes of inspection.

After a careful consideration of the evidence in the case I can not escape the conclusion that this requirement was intended as a provision to provide for inspection on the part of the city. In the first place, the provisions of the ordinance itself granting the defendant the right to use the streets and alleys of the city for the purpose of laying its pipes is, it seems to me, while not conclusive upon this point, as I held on the demurrer, yet of great weight. The ordinance expressly provides that the privilege is granted upon the condition that the said Columbus Gas, Light & Coke Company, its successors or assigns, shall annually pay to the City of Columbus, for the benefit of the gas and light fund of said city, the sum of four thousand dollars. In the cases which have been cited by counsel in their briefs, in no case did it appear that there was an express provision in the contract that the payment should be for any other purpose than inspection, and apparently there was no question raised in any of them but that the reservation was for inspection purposes, the question being as to the reasonableness of the exaction.

The Supreme Court of the United States held, in the case of *The Postal Telegraph Company v. Taylor*, 192 U. S., 64, that courts are not to be deceived by the mere phraseology in which an ordinance may be couched, where it appears conclusively that it was passed for an unlawful purpose, and not for the one stated therein. That is, it was held that although the ordinance provided for a payment for a proper purpose, yet if it appeared from the evidence that it was in fact an imposition for revenue purposes it could not be upheld. But in the case at bar the contract itself expressly states the purpose to which the money is to be devoted, to-wit, to the gas and light fund of the city. That is, it was a requirement that the defendant company should pay towards defraying the cost to the city of lighting

1905.]

City of Columbus v. Columbus Gas Co.

its public buildings and streets the sum of four thousand dollars per annum.

In the argument upon the demurrer it was contended by counsel for the city that this provision of the contract was not conclusive, and that it was not important whether it went into one fund or another, if in fact the sum paid was reasonably necessary to indemnify the city for the cost of the inspection in discharging this duty to safeguard the public from the dangers incident to the use of gas. I accepted this view of counsel for the city upon the demurrer and held that this alone would not be conclusive of the question. But the evidence in this case discloses that as a matter of fact the city has not provided by ordinance at any time since 1892 for the regulation or inspection of the gas companies, nor has any resolution or ordinance been passed appointing an inspector or fixing the compensation for his services. It is true Mr. Rose, the assistant city clerk, testified that it did not necessarily follow because no provision had been made by ordinance for the creation for such an office, that there had been no expense to the city on account of the inspection of the work of the defendant gas company, and that it would be necessary in order to determine that question to make an inspection of a vast amount of vouchers on file in the city departments which he had not made and to do which would require a very great deal of time and labor. But employees and officers of the defendant company who have been with the company for many years testified that they never knew of any inspection during the period since the passage of this ordinance granting to the defendant the use of the city streets and alleys, nor of any expense incurred by the city in any way, either for examination of gas made and furnished by the defendant company to its consumers or of its pipes. The position and opportunities of these witnesses to know are such that had there been any such expenditure on the part of the city by reason of the conduct of the defendant's business, it is inconceivable that they would not have had any knowledge of it.

It is true a copy of the ordinance passed by the city council on October 1, 1900, has been since the hearing, by agreement of

both sides, offered in evidence, which ordinance defines the duties of an officer denominated "inspector of plumbing and gas fitting," and which it is agreed was repealed in October, 1903. This ordinance does not purport to create such an office, and whether or not such office was ever created, and if so whether there was ever any appointment made to fill it or any expense incurred by the city on account of such office does not appear. The duties of this officer, as defined by this ordinance were to inspect the new buildings or the buildings which were being repaired within the city limits, and to see that all plumbing and house drainage is done in accordance with law and the ordinances of the city, etc. He is required to make such inspection on application of the owner or contractor of any building in course of construction or repair.

I observe first as to this that it does not appear that he has any duties to perform with reference to the gas fitting in the house, but only as to the plumbing and drainage, and for this inspection, of course, the defendant company could not be charged.

But there is a further reason why, in my opinion, this is not an expenditure which, even if for the inspection of gas fitting could be charged against the defendant company, if it be conceded that the city has a right to require the defendant company to pay any sum annually for any purpose. It is true upon the demurrer I stated that, in my opinion, this would be a proper matter for consideration in determining what amount the city might exact from the defendant, but I am not bound by the views there stated if upon further consideration I conclude they are unsound.

The city was authorized by statute to consent to the use of the streets and alleys by the defendants, and in my opinion its duty of supervision of the defendant extended no further than the grant and permission; that is to lay the pipes of the defendant company in the streets and alleys of the city. The plumbing and gas fitting in the houses of the citizens belongs not to the company, but to the owners of the houses. If they desire to purchase and use gas in lighting or heating their

1905.]

City of Columbus v. Columbus Gas Co.

houses, it is their duty to take proper precautions to provide safe gas-fitting in their houses. This is not the duty of the defendant company, and it can not be reasonably charged with the supervision and inspection of gas-fittings in the houses of its customers.

The law expressly authorizes municipal corporations to license dealers in powder and other explosives, and such reasonable sum may be exacted as will provide inspection and regulation of the storage and transmission by such dealers of these dangerous substances. But clearly they could not be held responsible for the failure of their customers to provide safe receptacles for it after it was delivered to them; nor could they be charged with inspection and supervision to insure such safe conduct on the part of their customers. No more can the defendant company be charged with the inspection and regulation of gas-fitting in the houses of their customers. The same may be said as to the statute which authorizes a municipal corporation to invest the fire engineer or other officer of the city with the duty of being present at all fires and to investigate the causes thereof and provide compensation for such services. This it seems to me is too remotely connected, if at all, with the privilege granted to the defendant company to be taken into consideration.

I also called attention to Section 2484 of the Revised Statutes in deciding the demurrer and expressed the opinion that the expense of such inspection of meters and gas would be a proper consideration in determining what amount should be required to be paid by the defendant. But upon further consideration I do not see any reason for saying that this may be charged to the defendant. There is no statutory provision authorizing it to be charged to the defendant. The city is not required to have such an officer and the evidence satisfies me it never has had such an officer. The fact that the city has never appointed such an officer is strong proof that it is not regarded as necessary by the city, as the creation of new offices by municipal corporations rarely falls short of the actual necessities of the case.

It is contended by counsel representing the city that evidence as to what the city has actually done in the way of providing

for inspection or regulation of the defendant is not competent, and that even if it appeared that it has not applied the money exacted of the defendant to the proper purpose that this is no defense for the defendant. This is undoubtedly true. If this stipulation for an annual payment to the city was one properly made for a proper purpose, the city being authorized to make such an exaction, the fact that the city may not have made the proper use of it would not have been a defense, as the city might be compelled to make the proper use of the money. But the question before the court for determination is, was this regulation for payment one made for revenue purposes and therefore void, or was it such a stipulation for payment as the city might properly require to enable it to make proper inspection to safeguard the public from the dangers incident to the business. The ordinance itself certainly does not make it clear that it was for the latter purpose. Indeed, if the terms of the ordinance itself are to be taken as conclusive, it is a provision for the payment by the defendant for revenue purposes only. But the city's contention is that this is not conclusive and this may be conceded. Neither in my opinion is the fact that there may possibly be expenses incurred by the city in the way of inspection, etc., conclusive.

The construction, therefore, which the city itself has put upon the matter by its own conduct is most persuasive as to the object and purposes of the exaction, and looking to the construction put upon it by the city itself leads irresistibly to the conclusion that it was a provision purely for revenue, and therefore it is without authority of law and void. If this be true, there can be no element of estoppel involved.

In deciding the demurrer I said, if it appeared that this requirement was for a purpose for which the city might rightly require the defendant to pay if authorized by statute, that even if there was defect of power in the municipal authorities, because of a want of such statutory authority, so long as the defendant continued to enjoy the grant it was estopped to question the right of the city to exact it. But if this requirement was for revenue purposes, then it was a tax pure and simple, and not

•

1905.]

City of Columbus v. Columbus Gas Co.

even the Legislature could authorize such a tax for the purpose of replenishing the city treasury. In such case there is not only a defect of power in the municipal authorities, but there is want of capacity to receive such power, and the principle that where there is only a defect of power a corporation, while continuing to enjoy the grant is estopped, does not apply. Equitable estoppel rests upon the principle that the party seeking to enforce the principle of estoppel has parted with something of value, and has been placed in a worse position than he would otherwise occupy by reason of the conduct which it is claimed gives rise to the estoppel. But as the city has no right in the streets which it could sell to the defendant, it parted with nothing of value, and there does not seem to be any principle of estoppel involved in such a case.

An instructive case on the principle of estoppel on account of stipulations in a grant of this sort, as against a corporation continuing to enjoy the grant, will be found in the case of *Macklin v. The Home Telephone Co. et al*, 1 C. C.—N. S., 373, and affirmed by the Supreme Court in 70 O. S., page 507.

Although I expressed the view in deciding the demurrer that the city had the right to require the payment of such sum as would insure a proper inspection and cover the reasonable expense to the city of taking proper precaution to guard against the dangers incident to the business, upon further and more extended consideration of the case upon this hearing, I am of opinion that such power has not been reposed in municipal corporations. It is an established principle of law, applicable to the powers of municipal corporations, that they possess only such powers as are expressly granted by statutes and such as are essential to carry into effect the powers which are expressly granted, and this does not mean such as are merely convenient, but such as are indispensable. There was no statute at the time when this ordinance was passed which expressly authorized a municipal corporation to require such payment from gas companies as a condition to the grant of the right to use the streets and alleys of the municipality. Is it necessarily implied in order to carry out the powers which are expressly granted and

indispensable thereto? I think not. The only express grant of power to municipalities by statute to regulate gas companies is found in Section 3550 of the Revised Statutes. This section provides that—

“A company organized for the purpose of supplying gas for lighting the streets and public and private buildings of a city, village, town or township, may manufacture, sell and furnish the gas required therein for such or other purposes, * * * and such companies may lay conductors for conducting gas through the streets, etc., with the consent of the municipal authorities of the city, village, or town, etc., and under such reasonable regulations as they may prescribe.”

As counsel for the defendant says, the principal purpose and object of this section is to authorize gas companies to manufacture and sell gas in municipalities and to lay their pipes in the streets and alleys with the consent of the city, under such reasonable regulations as the municipal authorities may prescribe, and that it only incidentally confers a power upon municipal corporations. It would seem that if the Legislature had intended to confer such extensive power as was here attempted to be exercised by the city, that it would have granted it in express terms. As Judge Spear says in *Ravenna v. The Pennsylvania Company*, 45 O. S., page 123:

“Municipal corporations are capable of exercising police powers; but when the question is whether such an organization has authority to enact a particular ordinance, it must be shown that the power to do the particular thing in the way marked out has been given, either expressly or by clear implication.”

That it was not expressly given by any statutory enactment is clear; nor do I think it is clearly to be implied. The Legislature has not clothed municipal corporations with plenary police powers. This is manifest from the numerous special grants contained in the statutes, and in this connection I call attention to the fact that Section 3461, which authorizes telegraph companies to construct their lines upon the streets of a municipality, expressly provided that nothing contained in it should be so construed as to authorize any municipal corporation to demand

1905].

City of Columbus v. Columbus Gas Co.

or receive any compensation for the use of a street, alley or public way beyond what may be necessary to restore the pavement to its former state of usefulness. The business of constructing and maintaining telegraph lines in the streets of a municipality does not seem to differ materially from the business of constructing and maintaining gas mains and pipes in such streets. Nor do I perceive in what respect the one is more dangerous than the other. In either case it is necessary to make excavations in the streets which necessitates the repair of the pavements. One of the principal dangers in either case undoubtedly arises from the excavation itself before it is filled, or after it has been filled from the settling of the earth resulting in uneven places in the pavement and consequent danger to persons using the street.

It appears from the evidence in this case that artificial gas in a main is practically without danger to the public. Unlike natural gas it is conveyed at a low pressure and the presence of such mains in the streets is no more dangerous, and indeed less dangerous than the presence of telegraph lines, practically the only danger from the use of gas being from the negligence of the users in permitting it to escape in their dwelling-houses. Yet the Legislature by the enactment of this statute, which was passed shortly prior to Section 3550, which alone confers any power upon municipalities to regulate gas companies, instead of recognizing any right in municipalities in the exercise of police power to exact money from telegraph companies for the use of the streets, provides expressly that only a sum sufficient to restore pavements to their former condition could be exacted.

In the light of this fact, and in the absence of express grant of power to require such payment of gas companies, is there any ground to hold that such power with reference to the use of streets by gas companies is necessarily implied? This provision of Section 3461 was but a recognition of the general legal doctrine that municipal corporations have no proprietary rights in the streets which they can sell. Is it reasonable to suppose that shortly after the enactment of Section 3461, and with reference to the use of the streets which is not, as it appears to me, different in any essential element from that of their use by

telegraph lines, that such a power not expressly conferred is necessarily to be applied from the provision with reference to regulation in connection with the laying of pipes in the streets and alleys? The provision of Section 3461, that that section shall not be construed to grant such a right in itself negatives the idea that there is any such general right of police regulation in municipal authorities, else where the necessity to guard against a construction of that special statute which would confer it? Such a construction would be harmless if that power already existed in municipal authorities. It is hardly to be presumed that the Legislature shortly after the enactment of Section 3461, and with reference to a similar use of the streets by another class of corporations, should leave to implication a right to the general and unrestricted exercise of such a power.

Again, the ordinance in question here in terms requires in addition to the payment of four thousand dollars per annum numerous regulations as to the use which the defendant might make of the streets, and in my opinion this is the extent of the city's rights to impose conditions under the provisions of Section 3550. The ordinance expressly stipulates that the defendant company should relay and replace all pavements disturbed by it within fifteen days, in as good condition as before the excavation was made, and to save and keep the city free and harmless from all damages and expenses that may happen to any person by reason of anything done by the company. The evidence shows that whenever the city found it necessary to make repairs to pavements which have been broken by the defendant company, it presented its bill to the company which was promptly paid. Aside, therefore, from the four thousand dollars required to be paid annually by the defendant, the ordinance expressly requires the defendant to do what the Legislature had shortly before declared was the limit of the city's right with reference to telegraph companies using its streets, and I have reached the conclusion that under the terms of Section 3550 this was the extent of the city's right to regulation of the use of the city's streets by the defendant, and that it had no power to require an annual payment of any sum of money for the benefit of the gas and light fund of the city.

1905.]

Hunt v. Fronizer et al.

In my opinion the conclusions here announced are supported by the decision of the Supreme Court in the case of *Ravenna v. Pennsylvania Company*, 45 O. S., 118; *Macklin v. The Home Telephone Company et al*, decided by the Circuit Court of Hocking County, 1 C. C.—N. S., page 373, and affirmed by the Supreme court of Ohio, 70 O. S., page 507, under the caption of *The City of Findlay v. The Home Telephone Company*.

My conclusion is, therefore, that the city is not entitled to recover anything of the defendant by reason of this provision in the ordinance, and the finding and judgment are in favor of the defendant.

I will note an exception by the plaintiff.

J. M. Butler, for plaintiff.

E. L. DeWitt, for defendant.

RECOVERY OF MONEY BY COUNTY PAID ON ILLEGAL BRIDGE CONTRACTS.

[Common Pleas Court of Sandusky County.]

STATE, EX REL M. W. HUNT v. S. M. FRONIZER ET AL.

Decided, April, 1905.

Constitutional Law—Section 1277, Authorizing Recovery by County of Money Paid on Illegal Contracts—Auditor's Certificate—as Required by Section 2834b—Ignoring of Statute not Justified by an Emergency—Pleading—Voluntary Payment—Res Judicata—Equitable Rights,

1. A demurrer to an answer, which denies the averments of fraud in the petition and alleges that the price charged was reasonable, that no damage has resulted to the plaintiff, and that non-compliance with statutory requirements was inadvertent rather than willful, raises different questions from those presented on demurrer to the petition, and should be determined independently of the ruling on the demurrer to the petition.
2. The clause restricting the operation of Section 2834b, as to the making of certain contracts by public officials and the auditor's certificate issue certifying that the money therefor is on hand or in process of collection, does not apply to county commissioners,

- and the act is therefore not invalid as to them, whatever may be the effect of the restriction as to officials to whom it does apply.
3. While it is the duty of county commissioners to keep county bridges in a reasonably safe condition, they are not in consequence thereof justified in ignoring statutory provisions as to repair or new construction.
 4. The rule as to voluntary payment does not apply to a voluntary payment by public officials of a claim contracted without authority by law.
 5. The fact that claims were regularly allowed and ordered paid by the proper officials is not *res judicata*, when these claims were founded on contracts which were invalid for non-compliance with statutory requirements.
 6. In a suit brought under Section 1277, authorizing the recovery of money paid out of the county treasury under an illegal contract, the failure of the defendant company, to whom the money was paid for the construction of certain bridges, to pray for the surrender of the bridges, is not a ground for a denial to the company of its equitable rights in the premises.

WILDMAN, J.

On demurrers of plaintiff to answers of the Bellefontaine Bridge & Iron Company, and others.

This case is, as I understand, one of a number instituted in Sandusky and other counties involving questions of great importance to the public and to persons and corporations dealing with the counties through the officials of the latter.

The actions are brought under the powers understood to be conferred by Revised Statutes, 1277, as now amended. This section authorizes prosecuting attorneys to institute actions in the name of the state to restrain any contemplated misapplication of county funds, or the completion of any illegal contract, or to recover back, for the use of the county, public moneys already misapplied or illegally drawn out of, or withheld from, the county treasury, or to recover, for the benefit of the county, any damages resulting from the execution of any such illegal contract.

The plaintiff here, suing the Bellefontaine Bridge & Iron Company and certain of its agents, seeks to recover, in separate causes of action, moneys of the county paid through said agents to said bridge and iron company.

1905.]

Hunt v. Fronizer et al.

It is claimed that these moneys were paid as the consideration for the constructing and furnishing to said county of certain bridges by said bridge and iron company pursuant to attempted contracts fraudulently and illegally entered into by some of the commissioners of said county with said bridge and iron company; that the bridges were so paid for at a price more than double their real value; that the transactions were fraudulent as between said company and said commissioners and illegal by reason of non-compliance with the statutory requirements of Ohio as to such contracts.

Demurrers to the petition were overruled by another judge of this court, and his opinion is found reported in 2 N. P.—N. S., 373.

The questions now before the court arise upon demurrers to the answers of the bridge and iron company and S. M. Fronizer and N. V. Elliott, its agents.

It is claimed in behalf of said defendants that the petition is defective calling for no answer, and that as the demurrers to the answers search the record, they should be overruled for that reason.

The question of the sufficiency of the petition having been passed upon by another judge of this court, I should be reluctant to hold the petition insufficient, whatever might be my personal views; but it is perhaps unnecessary at present to discuss the question as to whether the decision made upon the demurrers to the petition was correct or otherwise, in view of the fact that the answers now attacked deny all averments of fraud contained in the petition, and substantially allege that the claimed non-compliance with statutory requirements was inadvertent rather than willful. The answers also deny that the price of said bridges was excessive; deny all damages to the county or the plaintiffs and affirmatively allege matters of claimed defense.

As by the demurrers to these answers the plaintiff admits all of the material allegations of said answers to be true, quite a different case is presented for the consideration of the court from that involved in the hearing of the demurrers to the petition.

Only one of the acts or omissions mentioned in the petition, as constituting non-compliance with the law and thereby invalidat-

ing the bridge contracts, is conceded by the answers. That one is the alleged lack of the auditor's certificates required by Revised Statutes, 2834b—certificates as a pre-requisite to the making of such contracts, that the money required for the payment of the obligations was in the treasury or levied and in process of collection.

At the outset of my inquiry I find the question of the constitutionality of this section, raised by counsel for one of the defendants, a question of vital importance; for if the statutory requirement of an auditor's certificate is itself invalid, this attack on the bridge contracts must fail.

This statute is one of wide scope, embracing within its terms contracts not only of county commissioners, but of township trustees and boards of education of certain school districts. It is insisted, however, that broad as it is, it does not operate uniformly throughout the state, and hence violates the constitutional provision as to acts of a general nature. It is said that in express terms it excepts from its operation cities of a certain class and certain grades.

This court has up to this time, in common with other courts, treated the act as valid; and I am not aware that it has heretofore been assailed. Probably its supposed unconstitutionality has been suggested by the recent judicial overthrow of other legislation containing somewhat similar restrictions as to operation.

My impression of this particular act is that the restrictive clause refers to school boards and not to county commissioners; that it is only the transactions of boards of education of any school district "in cities of the first class," etc., that are exempted from the operation of the statute. Why the exception, it is perhaps not worth while now to inquire. Nor is it necessary to determine whether or not the act is in any wise invalidated by this clause. It is enough for the present case to hold that even if unconstitutional as to school boards, it does not follow that it is so as to county commissioners. My judgment is, that the act is valid in its application to transactions such as those in question in this action.

1905.]

Hunt v. Fronizer et al.

Assuming the constitutionality of the statute requiring the auditor's certificate, and in view of the concession in the answer demurred to, that no such certificates were filed before the making of the contracts with the bridge company, the contracts were, one and all, void by the terms of the act. No rights accrued to either bridge company or county by virtue of the written stipulations. If suit had been instituted by the county commissioners before the construction of the bridges for specific performance or damages, or by the bridge company after construction for the contract price as stipulated, no recovery could have been had. The courts would have left both parties where it found them. The contracts, if void, were non-enforceable upon the petition of either party.

Up to this stage of the inquiry the law is settled. The courts have definitely decided that a void contract can not be made the basis of an action. Equitable rights may arise between parties to the transaction, which may be enforceable, but not by virtue of enforceable provisions of the supposed contract.

Not only has our Supreme Court very definitely held in *Buchanan Bridge Co. v. Campbell*, 60 Ohio St., 406, that a contract made by the commissioners for a bridge, in violation or disregard of the statutes is void, so as to preclude recovery on such contract, but also that no recovery can be had against the county as upon an implied contract for the value of such bridge. It is forcibly said by Judge Burket, who delivers the opinion, that "to allow such a course would permit the evasion of the statutes. * * * The commissioners can not purchase supplies upon the reasonably worth plan, and no one is permitted to deal with them on that plan. The statute is the only authority and guide for both parties."

This decision was rendered in 1899, but the case presented was based upon transactions occurring prior to the amendment of 1898 to Revised Statutes, 1277, the amendment authorizing prosecuting attorneys in the name of the state to recover moneys illegally drawn from the county treasurer, or to recover, for the benefit of the county, "any damages resulting from the execution of any such illegal contract."

It appears that notwithstanding the rule obtaining prior to 1898, the courts will no longer leave the parties "where they have placed themselves and refuse to aid either." Before the act was amended, both the bridge companies and the counties were left where the companies on the one hand and the officers of the counties on the other, had placed them. Both were impotent to undo the consummated illegal act or avoid its results.

The amendment of 1898 is designed to restore to a public treasury what has been taken from it by the unauthorized act of public officials, or to make good to the public any damage which it has sustained from the execution of an illegal contract. To this extent at least it is remedial. Whether or not it is also so severely penal as to punish parties who enter into unauthorized contracts, with the loss of whatever thing of value was delivered to the public under such contract, is the question in this case which has received most attention from counsel.

Before considering this important question, however, it is proper that I pay some attention to a contention of the defendant bridge company, asserted in its answer by way of defense and urged also in the other answers. It is averred in substance that the validity of the claims of the bridge company has been duly passed on by the board of county commissioners, in their capacity as a legal tribunal, empowered to consider and allow or reject claims against the county; and that their allowance of the claims presented by this company was such an adjudication of the matter as will preclude further inquiry.

It is also urged as further defense that the principle of voluntary payment applies; that, as the bridges were voluntarily paid for, the company can not be compelled to return the money.

As to this last mentioned claim, it may suffice to say that if well founded it might in many cases be subversive of the statute of 1898, under favor of which the present action is brought. If the fact that an unauthorized payment from county funds is voluntarily made by its custodian, or voluntarily consented to by the other officials representing the public, will defeat its recovery back by any other representative expressly authorized by statute to take up the county's cause and by legal proceeding

1906.]

Hunt v. Fronizer et al.

procure the restoration of the money to the public treasury, the statute must in many, probably most cases, become ineffective. Such was surely not the legislative intent. My judgment, in view of the statute, is that it is not a matter of consequence that the payment was a voluntary one.

I feel equally clear that the contention of the bridge company that its claims were legally adjudicated and allowed by the board of commissioners, so as to preclude further inquiry, can not prevail. As in the case of the other defense, to sustain it would be subversive of the statute. To hold that commissioners, who even in their collective capacity can not make a valid contract, without obeying statutory requirements, may conclusively allow claims under contracts invalid for non-compliance with such requirements, would seem inconsistent and unreasonable. But I am not left in dependence upon my own judgment that the position taken by counsel is unsound. The Supreme Court has several times considered the effect of allowances of unauthorized claims by county commissioners. In *Jones v. Lucas Co.*, 57 Ohio St., 189, the court held:

"The board of county commissioners represents the county, in respect to its financial affairs, only so far as authority is given to it by statute. It may pass upon and adjudicate claims against the county for services in a matter, which, under the statutes, may be the subject of a legal claim against the county. But it is without jurisdiction to entertain or adjudicate claims which in themselves are wholly illegal and of such a nature as not to form the subject of a valid claim for any amount. And an attempt by the board to allow a claim of such character will not bind the county."

Judge Spear, on page 214, says in his opinion: "The demand being one which may form the basis for a claim, the commissioners may fix the amount; it is the amount only which they determine;" and on page 215, touching the application of the statute as to appeals from such allowances, he suggests that neither the claimant nor the commissioners would appeal from an allowance of the claim and adds: "So that, if the commissioners should entertain a demand wholly unfounded in law, and allow it, and their action upon such unfounded claim should

be treated as final unless appealed from, the people's money would be gone and they without remedy."

The case just cited, *Jones v. Lucas Co.*, is approved and followed in *Higgins v. Logan Co.* 62 Ohio St., 621; *Richardson v. State*, 66 Ohio St., 108, 113; and *Vindicator Ptg. Co. v. State*, 68 Ohio St., 362.

In *Richardson v. State*, *supra*, Williams, C. J., in his opinion, page 113, uses this language:

"It is further contended in behalf of the plaintiff in error, that the allowance of his claim by the board of commissioners, upon the certificate of the prosecuting attorney and approval of the probate judge, is equivalent to a judgment of a competent court upon the legality and merits of the claim, and, no appeal having been taken therefrom, is a bar to an action to recover the money back. Such an allowance, when no illegality appears on the face of the claim, may be sufficient to justify the treasurer in its payment, unless it is paid with knowledge of its infirmity otherwise obtained, but it can not operate to protect the person who unlawfully received the money, nor to deprive the county of its right to recover back the money when it has been unlawfully obtained from the treasury."

The case of *Vindicator Ptg. Co. v. State*, *supra*, like the case at bar, was, in its inception in the lower court, an action by the state to recover public moneys drawn from a county treasury. Spear, J., says, page 368:

"As held in *Jones v. Lucas Co.*, the power of the board to act at all does not exist where in law a demand has no legal basis upon which to stand."

Counsel for the bridge company, in the course of an elaborate and able brief, attempt to meet *Vindicator Ptg. Co. v. State*, *supra*, by an argument that it is not analogous to the case at bar; that the claim in that case allowed by the commissioners was not based on contract, or "in a matter on which the commissioners could contract at all."

I find myself, however, unpersuaded that the principles enunciated by the Supreme Court do not apply to the case before me. Here, as in *Vindicator Ptg. Co. v. State*, *supra*, was a demand which had "no legal basis on which to stand," and in such case,

1906.]

Hunt v. Fronizer et al.

as asserted by Judge Spear, "the power of the board to act at all does not exist."

I am confirmed in my judgment that the decision of the commissioners in allowing a claim based on an illegal and void contract is no more effective as an adjudication than an allowance of an invalid claim of any other kind, by an examination of an earlier decision of the Supreme Court, *State v. Yeatman*, 22 Ohio St., 546. In that case a writ of mandamus was sought to compel payment of a claim against Hamilton county, a claim for services performed under a contract with the commissioners. Although the commissioners had passed upon and allowed the claim, the court held that the contract was void for non-compliance with statutory requirement and the writ was refused. While the precise question of estoppel by adjudication was not expressly presented in the *Yeatman* case, it would seem to have been necessarily involved.

The plea of *res judicata* in the case before me is presented by each defendant in what is called a "second defense." The demurrers to this defense will be sustained for the reasons and upon the authority already stated.

The claim that the payment by the county was a voluntary one, and that that fact stands in the way of its recovery from the defendants by the county, is as I have indicated, in my judgment, untenable. The claim is, however, so blended in the answers with other important averments as not to constitute an independent and complete assertion of defense, and consequently can not be disposed of on demurrer.

Thus far I have considered contentions somewhat technical in their character; but averments of facts apparently more substantial and calling for the most careful and serious consideration, are set forth in the first defense of the answers of defendants, Elliott and Fronizer, and the third defense of the bridge company. The bridge company's answer contains no first defense, so numbered, all allegations preceding the "second defense," which has been disposed of, being merely matter of admission or denial of averments in the petition.

The statements in the answers of defendants, Elliott and Fronizer, as to the necessity of repairing or constructing

bridge for the safety of public travel, I do not deem material. While it was the duty of the commissioners to keep county bridges in reasonably safe condition, they were not, because of any alleged condition of such bridges, justified in ignoring the statutes prescribing their duties as to new construction or repair. If bridges, by reason of decay or other cause, had become unsafe, the commissioners might properly close them to travel until such time as, pursuant to law, they could be put into safe condition or new structures could be substituted. But I have been cited to no statutory provisions giving permission to commissioners to dispense with the auditor's certificate, because of any emergency demanding prompt action in letting bridge contracts.

But in the so-called third defense of the bridge company's answer and the first defense of those of the other defendants, are allegations varying in form, but alleging in substance not only the absence of any fraud on the part of said company or its agents, and not only the voluntary execution of the contracts by the parties, but also that the county, while seeking the return of the money to its treasury, retains in its possession and control the fruit of the illegal transaction—the structures for which the money was paid, asserted to be worth the full purchase price. It is alleged by the bridge company that no offer has ever been made by the county to relinquish such possession and control. The defendants, Elliott and Fronizer, allege that in the furnishing of the bridges, as agents of the bridge company, at the same times the contracts were entered into, they were led to believe by the said commissioners and did believe that all the provisions of law had been complied with and that the contracts were binding upon the parties thereto.

All these claims of the defendants must be taken as conceded by the demurrers, and the vital question for my consideration is whether, under such circumstances, where, without fraud, without intentional disregard of law, a bridge company has parted with valuable property surrendering the same to the public, and through its agents has received a stipulated price therefor, such company can be forced to return that price without either offer of relinquishment of the property by the public or order or de-

1905.]

Hunt v. Fronizer et al.

cree of the court for such relinquishment. This question is not answered by the adjudications to which reference has hereinbefore been made, and I am not advised that the Supreme Court of Ohio or any of the lower state courts have as yet passed upon it.

The statute of 1898, amending Section 1277, authorizes the recovery of moneys "illegally drawn or withheld from the county treasury," and also "any damages," caused by the execution of an "illegal contract." The defendants contend with much earnestness that the second of these remedies is the only one applicable to the case at bar; that the first was designed to compel the restoration to the treasury of moneys illegally taken therefrom, where no contract was involved; as, for instance, illegal fees paid to an official, without consideration therefor in the way of property of value delivered to the county. The argument in support of this construction is forcible and I have been much impressed with it; but I am not sure that it is not in a measure met by reasoning in the opinion of Judge Burket in *Buchanan Bridge Co. v. Campbell, supra*. If the county can recover only such "damages" as are the result of the illegal contract, does that not involve the charging it, in order to measure the damages sustained, with the full value of the bridges as against the price paid? This would practically result in a purchase on what Judge Burket calls the "reasonably worth plan," a plan not contemplated, at least before the amendment, by the statutes. Whether the Legislature, in enacting the amendment of 1898, contemplated so important a departure from the previous policy of the law may well be doubted.

If, however, this contention of the defendants as to the construction of the amendatory act, is untenable, it can not be disputed that the amendatory act of 1898 abrogates the rule of long standing recognized and enunciated in *Buchanan Bridge Co. v. Campbell, supra*, that the courts will leave parties to illegal contracts where it finds them. In this case, illegal and void contracts were made and on both sides executed. The company delivered the bridges; the county paid the price. The amendatory statute says that the price shall be returned. It does not

say what shall become of the bridges, the title to which has not passed to the public by any valid sale.

If the county were an individual, authorized by statute to recover his money from any person or corporation to whom it had been paid by an unfaithful or careless servant, although the statute might be silent as to the disposition of any consideration received by such individual for the payment, equity would prevail; for it was to supply the defects of the law and maintain justice among men that courts of equity were established. To be sure, this is not technically an equitable suit to rescind a contract for fraud or illegality. It is an action at law for the recovery of money; but under Section 5067, of our code of civil procedure, defendants may set forth such grounds of defense as they may have, "whether they are such as have been heretofore denominated legal or equitable, or both."

The statute, as I have said, is silent as to whether the bridges shall be restored or retained by the county where suit is instituted for the return of the price paid. It is urged by the plaintiff that the loss of the bridge is a penalty contemplated by the statute to be borne by the defendants for their disregard of law. Is this a correct interpretation, or is it rather true that the law is remedial, to protect the public from loss? It is not expressly penal, unless the provision that the contract shall be void, so that both parties are deprived of all its benefits, fixes a sort of penalty. There would seem something of inequality and injustice in providing a heavy penalty, to be borne by the one party to the transactions, the bridge company, while the other parties, the various county officials who consent to the contracts and the unlawful use of the public funds, remain unpunished. True, an independent punishment is provided for the willful and corrupt misconduct of commissioners; and like conduct of the other contracting parties might as well deserve it. But I am considering now, a condition where, as presented by these demurrers, willful misconduct and intentional violation of law are eliminated.

Until the amendatory statute of 1898 a county whose officials paid out funds in fulfillment of invalid contracts, had no recourse on the recipient. This principle, recognized in *Bu-*

1905.]

Hunt v. Fronizer et al.

chanan Bridge Co. v. Campbell, supra, subjected an innocent public to loss because of the voluntary, but unauthorized acts of its agents. To cure the manifest injustice of the principle, a new remedy was given to the public by the amendment. An action was provided for the recovery of the money and its restoration to the public fund. The reason for the amendment is manifest. The agents of the county exceeded their authority, and although they acted voluntarily, the county did not voluntarily part with its money. The voluntary acts of the officials were not the voluntary acts of the public.

By the amendment, as I construe it, an action was given to the county as represented by its prosecuting attorney, first, to sue and recover back money illegally drawn from the treasury and paid out for bridges; or, secondly, to sue and recover damages resulting from the execution of the illegal contracts. The second of these remedies might be consistent with the retention of the bridges by the county; but the first, which has been adopted in this case, is in the nature of an entire rescission of the contracts. Can the county elect to rescind the contracts and cling to whatever of value was received under them?

The case is not nominally an action to rescind. It is not a suit in chancery, but an action at law for money only.

The effect, however, of a judgment in favor of the plaintiff is equivalent to a rescission of the contracts.

In the early case of *Brown v. Witter*, 10 Ohio, 142, it was held:

“A purchaser from a vendor who can not make a title has his choice of remedies. He may sue at law to recover damages * * * or he may rescind by bill in equity or by an action at law for the purchase money. * * * If he choose to rescind, he must be able to restore to the vendor all he received, and place him back in his original situation.”

In the case cited, an action at law by a purchaser of land to recover the purchase money paid by him, is considered as a “rescission” of the purchase, and the equitable principle of restoration is deemed applicable in such action at law, as fully as in a suit in chancery.

This action, authorized by the act of 1898, is one at law for money; but none the less it rescinds, in behalf of the vendee,

the purchase of property of value. Agents of the county, exceeding their legal authority, attempted to buy bridges for the county and paid the money of the county for them. The county repudiates the purchase, and demands back the money. If there was no purchase, the county does not own the bridges, and under very familiar principles of equity can not insist on retaining their possession. Although this proposition has not found expression so far as I know in the adjudication of any state court of Ohio, it is very clearly and forcibly enunciated in the case of *Lee v. Monroe Co.*, decided by the United States Circuit Court of Appeals of the Sixth Circuit (114 Fed., 744; 52 C. C. A., 376), a case which seems to have escaped the attention of counsel, but which bears closely on the points involved in the case before me.

The appellant in the cited case had come into possession as purchaser of certain warrants on the treasurer of Monroe county, issued by the auditor in payment to the Canton Bridge Company, of a balance claimed to be due for bridges constructed by said company for said county. The county treasurer was enjoined from payment of the warrants because the county commissioners in attempting to purchase the bridges had failed to comply with statutory requirements.

Thereupon, after offers and refusals of compromise, the appellant, complainant below, brought suit asking that on repayment of an amount already received by the bridge company he be adjudged entitled to take down and remove the bridges, and that an account be taken concerning their use by the county, or that if the defendant should elect to keep the bridges, it might do so on condition of paying for them. To this petition the defendant demurred and demurrer was, in the court below, sustained. The court of appeals reversed this decision. I quote some of the language used in the opinion, following a consideration of the Ohio statutes and *Buchanan Bridge Co. v. Campbell, supra*:

“There is no attempt in this case to enforce these contracts, directly or indirectly, or to collect the value of the bridges under an implied promise to pay for them. The Supreme Court of Ohio has not declared it to be the public policy of the state to al-

1905.]

Hunt v. Fronizer et al.

low its municipal officers to induce people to part with their property, and then set up its want of power to pay for it and thus appropriate it, because it has been able to deceive the persons who furnished it, relying on the ability of the municipality to bind itself. It has announced that contracts made by a municipality in disregard of the statutes of the state are absolutely void, and will not lay the foundation for a recovery of any part of the price stipulated for in the contract; and that a municipality can not bind itself to pay what property is reasonably worth when it is furnished, in disregard of the statutes. But while the law affords no remedy, equity, although it will not enforce the contract or create a contract between the parties on account of the acceptance and retention of the property, while the property is in existence, and in the hands of the defendant, will not allow it to retain that to which it has no title whatever and prevent the owner from reclaiming it. The case presented by the bill shows no moral turpitude in the transaction, and, although the bridge company should have ascertained whether each step provided by the statutes had been properly taken, the law placed upon the defendant the duty of taking those steps. It was necessary for it to comply with every provision of the statutes in that behalf before entering into these contracts, and it represented to the bridge company that it had so complied, and thus misled the bridge company into entering into the agreement, the carrying out of which placed these bridges in the hands of the defendant. The complainant has no remedy at law, and to deny him equitable relief would be to enforce the contract on the part of the bridge company, and to allow the defendant to repudiate its part of the same contract, and thereby appropriate, without compensation, property to which it had no legal or equitable right. It was said by the federal Supreme Court in the case of *Marsh v. Fulton Co.*, 77 U. S. (10 Wall.), 676, 684:

“The obligation to do justice rests upon all persons, natural or artificial; and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.”

“If there was any fraudulent purpose of the bridge company, or connivance on its part at the action of the defendant in disregarding the provisions of the statutes, so that the purpose for which those provisions were enacted should be thwarted, then neither the bridge company nor this complainant could come into a court of equity and ask any relief, as they could not come into court with clean hands: and the relief would be

denied for that reason, and not on the doctrine of the public policy of the state. There is no public policy recognized by the courts which allows any person, natural or artificial, to take the property of another, and appropriate it to its own use, and deny to the person who is innocent of fraud the right to reclaim it. As there was no contract binding on either party in this case, and there was no fraud on the part of the bridge company or this complainant, and the property is in existence and in the hands of the defendant, it seems clear that the relief asked for should be granted. The case seems to come entirely within the principles laid down by the Supreme Court in the case of *Chapman v. Douglas Co.*, 107 U. S., 348. See also, *Wrought-Iron Bridge Co. v. Utica*, 17 Fed. Rep., 316.

"The decree sustaining the demurrer should be reversed and the demurrer overruled, with leave to defendant to answer."

I have quoted thus extensively from this federal decision because the reasoning seems to me both forcible and pertinent. If a bill in chancery would stand, to compel a county to elect whether or not it would retain bridges or pay for them, and for judgment authorizing the removal of the bridges if they were not paid for, surely in a case where the county, through its prosecutor, who is legally authorized to sue, has already elected to ask the return of the entire purchase money, the party who has furnished the property paid for may, by way of equitable defense or cross-petition set up the fact alleged in the answers herein. In the answer of the bridge company, they are alleged as defense merely, said defendant praying "to be dismissed hence without day" and "for costs." The defendants, Elliott and Fronizer with some variation of detail, allege the same facts in substance, and in addition to a prayer for dismissal of the petition ask general equitable relief. In the transactions made the subject of the litigation, however, they acted but as agents of the bridge company, claiming no ownership in either bridges or purchase money, and I do not discover that they have any other than a defensive interest in the controversy.

But all the defendants pray for some action on the part of the court, and on demurrer to the answers, perhaps, the forms of the prayers therein are not important. In the case of *Bloch v. Koch*, 1 Bull., 91, the Cuyahoga district court reversed a ruling of the

lower court which had sustained a demurrer to a petition alleging sufficient facts to constitute a cause of action, but praying for relief to which the petitioner was not entitled.

"It is well settled in this state," say the court, page 56, "that the prayer forms no part of the petition. That although the pleader is mistaken in the relief which he asks, yet if the facts stated show the party entitled to relief, the court will give such as the case may require."

Upon proceedings in error to this decision, the Supreme Court held in *Koch v. Bloch*, 29 Ohio St., 565, 567:

"We think the district court were right in reversing the judgment of the court of common pleas."

In *Tiffin Glass Co. v. Stoehr*, 54 Ohio St., 157, the Supreme Court held substantially that a misconception as to the legal rights of a party upon his alleged facts "must be disregarded in passing judgment upon the pleading," and on page 163, Minshall, J., in his opinion says: "A prayer for relief is no part of a cause of action."

The same judge, in *Pitts., C. & St. L. Ry. v. Reynolds*, 55 Ohio St., 370, 379, used this language:

"If the agreed statement showed the plaintiff entitled to any relief upon the averments of the petition, the court should have awarded it. It makes no difference what the plaintiff may regard the nature of the wrong of which he complains, if the facts stated show that it is a wrong for which he should be compensated," etc.

In *Kerr v. Bellefontaine*, 59 Ohio St., 446, the same principle was adhered to, and all the three cases last mentioned were cited approvingly and followed in *Coffinberry v. Oil Co.*, 68 Ohio St., 488, 489, 497, 499. On page 497 it is said that the view that he is not entitled to the specific relief prayed for, "is no reason for sending the plaintiff out of court empty handed." A demurrer had been sustained in the lower courts and the decision was reversed by the Supreme Court.

All the defendants in this case have, in their answers, stated facts which entitle the bridge company to the equitable protection of the court as a prerequisite to the allowance of a judg-

ment in favor of the plaintiff for the return to the county treasury of the money withdrawn therefrom. That there is no specific prayer for a decree giving this protection is not fatal to the answers, and they are not obnoxious to a demurrer on that account.

I do not hold nor is it my judgment that the petition should have alleged a tender of the bridges to the company. The bridges were placed in their position by the company, not by the county. But the defendants may justly insist, as held in *Brown v. Witter, supra*, that if the county choose to rescind the purchase of the bridges, it must be able to restore them to the vendor, and place said vendor in its original situation.

In the case of *Sportsman Shot Co. v. Shot & Lead Co.*, 30 Bull., 87, the Superior Court of Cincinnati refused to rescind a contract and conveyance alleged to be illegal as establishing a trust, because one of the parties was unable to place the other in *statu quo*. See also to like effect *Reed v. McGrew*, 5 Ohio 375; *Brown v. Witter, supra*.

This principle does not involve a taking up or removal of the bridges by the county. They are hardly susceptible of specific tender, and even if they were, the law of Ohio, as settled by our Supreme Court in like cases of rescission, does not require it. It may be urged, however, with ample support of authority, that, conceding the facts alleged in the answers, the plaintiff should offer, in reply if not in petition, as a condition precedent to recovery, to comply with whatever decree the court may make on those facts. This was substantially the holding in *Saxton v. Seiberling*, 48 Ohio St., 554; and in *Waters v. Lemmon*, 4 Ohio, 229, it was held:

“A decree in equity, on complaint of a purchaser of land, rescinding the contract, and directing the purchase money to be refunded, and leaving the purchaser in unconditional possession of the land purchased, is erroneous.”

On page 231 of the same case the failure of the plaintiff to offer to surrender the land is seemingly criticised, and the decree of the lower court, conforming to the bill without order of restoration of the land, is reversed. In *Railway v. Steinfeld*, 42

1906.]

Burrell v. Anchor Fire Insurance Co.

Ohio St., 449, 450, it was held error to rescind where the complaining party "neither pays back nor offers to return the money received by him under the contract."

See, also, *Atlas Nat. Bank v. Rheinstrom*, 4 N. P., 15, for an implied recognition of the doctrine that in seeking rescission a plaintiff must offer to abide by the decree of the chancellor, and in the same connection a dictum of Judge Follett in *Younglove v. Hackman*, 43 Ohio St., 69, 74, 75.

The citations are numerous which might be made of adjudications bearing more or less closely on the questions involved in these demurrers. My judgment is, that on principle as well as authority, except as to the so-called second defense of *res judicata*, they should be and they are therefore overruled. I can not more fittingly close this opinion than by re quoting as applicable in a general way to the issues presented and ably discussed by counsel on both sides, the forcible words used by the Supreme Court of the United States in *Marsh v. Fulton Co.*, 77 U. S. (10 Wall.), 676-684, and repeated by Chief Justice Waite in *Louisiana v. Wood*, 102 U. S., 294, 299:

"The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

M. W. Hunt, Basil Meek and H. C. DeRan, for plaintiff.

Samuel West, for bridge company.

James Hunt and Lester Wilson, for Fronizer and Elliott.

VACATION OF JUDGMENTS.

[Common Pleas Court of Lorain County.]

EMMA BURRELL v. THE ANCHOR FIRE INSURANCE COMPANY.*

Decided, December 28, 1904.

Judgments—Court May Modify, When—Application of Section 5354—Discretion of Court in Setting Judgment Aside—Notice by Clerk to Counsel of Progress of Case—Clerk Becomes Agent of Counsel, When.

* Affirmed by the Circuit Court, *Anchor Fire Insurance Co. v. Burrell*, May 8, 1906.

1. The control of a court over its judgments up to the end of the term in which they are rendered is in nowise affected by Section 5354, Revised Statutes.
2. The discretion which is vested in a court to vacate or modify its judgments during term is a wise and just discretion, and does not authorize such action to satisfy a mere desire or whim.
3. An attorney who requests the clerk of court to keep him informed as to the progress of the case and its date for trial thereby makes him his agent, and dereliction of duty on the part of the clerk in that behalf would fall upon the principal.
4. A judgment entered in the absence of the defendant and his attorney will not be set aside because of the negligence or inadvertence of the attorney in keeping informed as to the progress of the case, or because of the failure of one of his own employes or of the clerk of the court to inform him that the case was coming on for determination.

WASHBURN, J. (orally).

Heard on motion to set aside judgment.

The question in the case of Emma Burrell v. The Anchor Fire Insurance Company, arises on a motion to set aside the judgment entered at this term of court in said case.

The judgment was entered in this way: The case was assigned for trial upon the call of the docket at the first of the term; it remained upon the assignment for between thirty and sixty days, and finally was reached. At that time it was desired to submit the matter to the jury, but the jury was engaged in deliberating upon a verdict in a case, and remained out longer than was expected, and no one appearing for the defendant, the plaintiff waived a jury trial, and submitted the case to the court, but did not take a simple default. The case was submitted upon the evidence of the plaintiff. Some evidence was introduced to the court upon all of the material allegations of the petition, and the court, on considering that evidence, entered judgment in accordance with the prayer of the petition.

Now a motion has been filed to set aside that judgment, and it being filed before the end of the term at which it was rendered, the question was argued as to whether the court had the right to set aside the judgment in the absence of compliance by the defendant with Section 5354 of the Revised Statutes of Ohio, which provides what shall be done in an application to set

1905.]

Burrell v. Anchor Fire Insurance Co.

aside a judgment at a term subsequent to the term at which the judgment was entered.

I find that there is overwhelming authority in the state of Ohio upon the proposition, that a court has control of its judgments and decrees up to the end of the term at which they are entered. It may, at its discretion, for good cause shown, set aside and vacate its judgments or modify them. 3 O. S., 445; 9 O. S., 505; 49 O. S., 370; 19 C. C., 237.

The statute mentioned provides certain steps to be taken where it is sought to modify or vacate a judgment upon a petition filed at a subsequent term; but those conditions are not binding upon the court in deciding the matter of granting a motion to set aside a judgment, which is filed at the same term at which the judgment was rendered, so that by at least three Supreme Court decisions and by the decision of our circuit court, this court has authority in this instance to set aside the judgment in this case, at its discretion, upon good cause being shown.

Now the statement that it is at its discretion, does not mean that the court may, just because it desires, set aside a judgment; it means that more or less discretion is given to the court in doing that; but it can not do it unless it is upon such ground as the higher court would say justified the lower court in doing what it did.

The case cited in 19 C. C., 237. was where the lower court had set aside the judgment, and the circuit court of this circuit affirmed the lower court, recognizing, however, the fact that the circuit court had a right to decide whether the lower court was right or wrong in setting aside that judgment.

I find a later case decided by our circuit court, which is in 21 C. C., 764, the opinion being delivered by the same judge, in which a judgment was set aside by the court of common pleas, and error was prosecuted, and our circuit court decided that the judge of the court of common pleas was wrong in setting aside the judgment, and they reversed the action of the common pleas in setting aside the judgment, and reinstated the former judgment. Thus the matter has been twice before the circuit court in this district; in one case the holding was that the common

pleas court was right, and in the other that it was wrong; and if counsel will read the case I have just referred to, they will find it cites a large number of cases upon this subject, and they will also find some very significant language used by Judge Marvin, which I think applies to the case at bar.

Now the question as to what the court ought to do in this case about setting this judgment aside depends upon what the facts are.

I find from the testimony adduced at the trial, where one side only was heard, and from the facts and testimony introduced at the hearing of the motion to set aside the judgment, that the facts are substantially as follows:

The plaintiff, who lived near Oberlin, was the owner of certain personal property; that her daughter purchased a piano and moved it to plaintiff's house, and desiring to protect said property, and especially said piano against loss by fire, plaintiff applied to J. H. Lang for insurance. He issued to her an insurance policy of the defendant company, for which she paid. One of the provisions of said policy was, that it covered the property of any member of the family of plaintiff while in the premises described. The piano was mortgaged, and a chattel mortgage was duly filed with the township clerk, and testimony was introduced at the hearing of the motion, and I think at the trial too, to the effect that said agent of the company knew about this chattel mortgage. A fire occurred and the defendant company sent an adjuster, after notice of the fire, to see the plaintiff, Mrs. Burrell. First he went to Norwalk, as the testimony showed, to see the company that sold the piano and had the mortgage upon it; and he then went to see the plaintiff, and her testimony and the testimony of her witnesses showed that he represented to her that the piano was not insured, and that she could not recover anything for that; that if it was insured or covered by the policy, that the chattel mortgage on it rendered that part of the insurance void; that the piano company were about to sue her and attach whatever was due her as insurance on the balance of the property covered by the policy, and that if she did not settle and secure her money, whatever was coming to her, at once, that she never would get anything, because the

1905.]

Burrell v. Anchor Fire Insurance Co.

piano company would take that for the balance due on the piano; that upon those representations she settled a five hundred dollar claim for \$146.50 and gave a receipt therefor, and gave up her policy.

I might say that this fraud and deception is not denied in this court by any testimony upon which could be predicated a prosecution for perjury. By affidavit the vice-president of the defendant company swears that said claim agent or adjuster never made any such statements or representations; but the claim agent does not swear to that, and manifestly the man who did swear to it can not know anything about it, except by hearsay, because he was not present.

Testimony on the other side was given upon the hearing in court in the proceedings, upon which, if it was false, could be based a prosecution for perjury. Testimony was also adduced showing that the piano company never made any such statements to the adjuster of the defendant.

This action was brought in June; the defendant, as appears, engaged no attorney at the time, but depended upon its vice-president, who is an attorney at law, and who attends to the business of the company—the preliminary business at least of preparing cases for trial—to look after the case. He received the summons, and his affidavit shows he filed a motion in this court, and that motion was to require this plaintiff to set out a copy of the insurance policy which they had theretofore taken from her on settlement, and had then in their possession. That is all there was of that motion, and it was filed notwithstanding the fact that the defendant then had the policy in its possession, and the further fact that the petition alleged that the plaintiff had surrendered said policy to the defendant.

The company sent that motion to the clerk of this court, and the clerk acknowledged receipt of it. When he sent it he did not ask the clerk to notify him when it was to be heard or when any other proceedings were to be had in the case; when the clerk acknowledged receipt of it, he wrote nothing else in reference to the case. The clerk did not thereafter write to the defendant, nor did the defendant thereafter write to the clerk in reference to the case.

No local attorneys were employed. The motion in due course of time was heard and overruled at a former term. And then, as I have stated, at this term when the docket was called the case was placed upon the assignment for trial, and was reached and judgment was entered in the manner I have indicated. As an excuse for their not attending the case, they say, the affidavit says that the attorney in charge of the matter has had thirteen years practice in several states, and he never has known of a case where the clerk did not notify foreign counsel of every step that was being taken in a case, and that he feels sure there is some order of this court requiring the clerk to do that. Perhaps ordinarily this court ought not to take judicial notice of such matters, but this being somewhat of a discretionary matter, I do take judicial notice of the fact that it is not the custom and never has been in this court to notify foreign counsel of the proceedings in reference to their cases, and I do not think that such is the practice of the clerks in this state, except when requested so to do; but even if requested, Judge Nye has held, to my knowledge, that the clerk being so requested is made the agent of the party requesting him, and his dereliction of duty or failure to notify, is the fault of his principal, and relief has been refused in this court where the party claimed that the clerk has promised to do something and had not done it.

The court has never ordered the clerk to notify foreign counsel in reference to their cases.

Now in the case to which I have referred, which was decided by Judge Marvin, Mr. Burrows, the defendant's attorney in that case, made affidavit that judgment was taken by default, and I call attention to the fact that these cases are all judgments by default, and the case I am now deciding, while in a sense a default judgment, really in fact was a judgment rendered upon evidence in the case, covering one side of the case.

In that case George H. Burrows made affidavit that by mistake of a clerk in his office that case was omitted from the list of cases to which his attention should have been called, and that the attorney did not know that he was in default for answer until after the judgment was taken. He also set up what his

1905.]

Burrell v. Anchor Fire Insurance Co.

defense would be if the judgment was set aside, and the common pleas court set the judgment aside. Error in setting it aside was prosecuted, and Judge Marvin in delivering the opinion of the circuit court, says:

“That the excuse given for not filing an answer in time by counsel for defendant is a very weak one can not be denied; and the court would have been justified in refusing to set aside the judgment.”

Now there was a case where the attorney relied upon somebody he had a right to rely upon, that he was paying for attending to those matters, and he had a large amount of business, and there was some excuse for his not attending to the case.

It is held in the 60 Minn., 117, “that it is error to set aside a default, caused by the negligence of an attorney.”

It is held in the 179 Ills., 68, “that the mistake of an attorney’s clerk is the inadvertence of the attorney and not ground for setting aside a judgment.”

“Default will not be set aside for negligence of attorney.” 56 California, 175.

“Inadvertence of the attorney is no ground for setting aside a default.” 44 Ill. App., 233.

If the attorney for defendant forgets the date for trial, default will not be set aside. 2 Ind. App., 55.

So there seems to be a large number of decisions along that line, and the circuit court of this circuit placed enough reliance in the propositions of those cases to reverse a case where a judgment had been set aside, where the excuse for the attorney was at least as valid an excuse as the one in the case at bar.

I therefore hold that in the case at bar, the excuse as set forth in the affidavit is not such as to justify the court in setting aside the judgment.

But in the case in the 21 C. C., 764, the circuit court went further, and considered the defense that the defendant would set up if a new trial was granted, and the court came to the conclusion that that defense was not a good defense, and of course they had to come to that conclusion without having fully heard the merits of both sides of the case.

In the case I am now deciding I heard fully one side of the claims of fraud; I have not heard fully the claims on the other side; I have the affidavits of parties that do not know anything about it that deny there was any such fraud.

The amount of insurance in this case was \$500. The insured was a widow woman, an elderly lady, the loss as shown by the proof was a total loss, practically a loss of \$500 and a settlement was made for \$146.50 with an adjuster, and if I should set this aside I do not believe that any jury would hold the plaintiff to a settlement of \$146.50 for that claim, under the circumstances.

The result would be great inconvenience and expense to her, because of the neglect of the defendant.

Entertaining these views, and believing from the facts in this case that substantial justice will be done by refusing the motion to set aside judgment in this case, I will make that order, giving the defendant the benefit of an exception.

I might add, that I have felt that the practice in this county in reference to judgments by default has not been exactly as it should be; that is, that a judgment means something, and when it is taken in court it ought to be treated as meaning something, and it ought not to be set aside, except upon good and sufficient grounds in furtherance of justice. I believe we ought to pay more attention than we have done to our answer days and to our defaults, and not think that merely because a matter is neglected, that by asking it parties can be placed back where they were.

Chamberlain & Hamlin, for plaintiff.

F. D. Prentice, for defendant.

IRREGULARITIES IN BRANNOCK LAW ELECTION.

[Probate Court of Cuyahoga County.]

**IN RE PETITION OF JOHN F. AMMER, CONTESTING AN ELECTION
HELD UNDER "THE BRANNOCK LAW."**

Decided, November 15, 1904.

Liquor Laws—Contest of Election—Held under the Brannock Law—Irregularities—In The Boundaries of the Residence District—In Designating a Polling Place Outside of the District—And in the Manner of Receiving the Ballots—Application of the Law Relating to Contest of Election of Justice of the Peace.

1. Rules as to the formality and regularity of elections, held under the Ohio Statutes for the purpose of restricting the sale of intoxicating liquor, should be deduced direct from the statutes, and from general principles relating to elections and the decisions of our own state, rather than to the decisions of other states which have special reference to the policy and legislation of such states.
2. The designation, in an order for an election and the proclamation giving notice thereof under the Brannock Law, of a voting place on the opposite side of a street forming one of the boundaries of the proposed district and fifteen feet beyond the center of the street where the boundary line runs, is not a sufficient ground for setting aside the will of the voters as expressed by a decided majority, in the absence of any showing of fraud, or that any electors were mislead thereby or deprived of an opportunity to vote, or that the result would have been different had the voting place and booth been properly located within the district.

WHITE, J.

This is a petition to contest an election held under the act of the General Assembly of Ohio, passed April 18th, 1904, and approved by the governor of Ohio, April 19th, 1904 (97 Ohio Laws, page 87), commonly known as "The Brannock Law." This election was held on the 7th day of July, 1904, in a residence district of the city of Cleveland. The petitioner is a qualified elector of the residence district in which the election was held. He sets forth in his petition a description of the residence district, which is somewhat lengthy, and which I do not quote for the reason that, while it is stated in the petition that said resi-

1905.]

In re Petition of John F. Ammer.

dence district is not a clearly described, contiguous and compact section, or territory in a municipal corporation, bounded by streets, corporation or other recognized lines or boundaries, as required by the terms and conditions of said act known as the Brannock Bill, yet, on the hearing, no insistence was made upon this irregularity, if it was an irregularity, in the petition for the election.

The petitioner states that there were to be two voting booths or places for holding the election in said district on the 7th day of July, 1904, one of which booths or voting places was not within the residence district so defined and described in the petition, and that the order of the Honorable T. K. Dissette, judge of the court of common pleas, designates one of said booths or election place, known as "Ward 22, H," as being located on the southeast corner of Lexington and Giddings avenues, in the city of Cleveland, which southeast corner of Lexington and Giddings avenues is not within the district described in the petition filed with the said Honorable T. K. Dissette, and not within the district described and defined in the order for said election, issued by the said judge; and that said voting place or booth known as "Ward 22, H" should have been placed within the boundaries of the district described therein, as required by said law.

There are other allegations of irregularity in said petition upon which some evidence was offered, but which, in argument, and on submission to the court, counsel for the petitioner do not insist. The chief of these was the irregularity charged in the petition that the election officers failed to comply with the sections of the Revised Statutes of Ohio providing for elections in the state of Ohio, in this, that they did not record the names of electors in the poll books at the time the votes were cast, and that votes were cast by electors in which the "secondary stub," so called, was not detached from the ballot by the election officer or officers, and that ballots were cast at said election on which the electors themselves wrote their respective names or numbers, or both, upon the secondary stub, so called, instead of their being written by the proper election officers as required by law.

This case comes before the court after the taking of some evidence as to the irregularities of this election, and the improper location of the voting place, without the introduction of any countervailing evidence, and upon a motion or submission in the nature of a demurrer to the case made by the petitioner.

It is stated in the petition that the majority of votes cast in favor of prohibiting the sale of intoxicating liquors as a beverage, within the limits of said residence district, was about forty.

The petition is urged chiefly, and I may say exclusively, upon the irregularity as to the actual order for, and the actual location of, the booths or voting place at the southeast corner of Lexington and Giddings avenues in this city. The easterly boundary line of the residence district which, I believe, was known as "District No. 16," as described in the petition for the election, and in the order made by the Honorable T. K. Disette, was the *center line of Giddings avenue* for a certain distance. The voting booth known as "Ward 22, H," and which constituted one of the voting places, was located on the east side, within the street lines, of Giddings avenue, but upon the east side thereof, and about fifteen feet from the center line of said avenue; when it should have been, to have been actually within the lines of the district, on the southwest side of Giddings avenue, at the corner of Giddings and Lexington avenues. It was located at the corner of Giddings and Lexington avenues, but on the southeast corner, instead of the southwest corner, and within fifteen feet of its proper location, so as to have been wholly within the residence district.

The number of votes cast at this polling place is not stated in the petition, nor is it shown in the evidence, and it is not shown that any fraud was practiced in thus placing the booth and polling place; nor that any electors were misled thereby, or deprived of their right and opportunity to vote at said election: nor is it insisted that the result would have been changed if said polling place and booth had been properly located within said district.

It is insisted by the petitioner, by his counsel, that the Brannock Law, so-called, provides that the election shall be held at

the usual place or places for holding municipal elections "*in said residence district*," if there be such place or places; and if not, at such place as the mayor or judge may direct "*within*" said residence district, and notice shall be given and the election conducted in all respects as provided by law for the election of members of the council of said corporation, so far as said law may be applicable.

Again, that at such election only duly qualified electors residing "*within*" the residence district shall be entitled to vote.

Again, that when the petition, with the proper percentage of qualified electors of any residence district, is presented to a common pleas judge, or the mayor of the city, the common pleas judge or mayor shall order a special election to be held in not less than twenty days, nor more than thirty days from the filing of such petition.

It is contended that in respect of all these requirements and conditions to be contained in the order of the judge or mayor, and in the mayor's proclamation, giving notice of the election; the designation of voting places *within* the district, and not *without*; the time of the election, not less than twenty, nor more than thirty, days from the filing of the petition; that the election shall be conducted in all respects as provided for by law for the election of members of the council of the corporation; and that only the qualified electors residing within the district shall be entitled to vote—are each and all mandatory provisions, and must be strictly complied with by the respective officers upon whom the duty is devolved of making the order and proclaiming the election, the enactment itself being in its nature a penal statute, which must in every particular be strictly construed; that the placing of an election booth a few feet from the residence district is as fatal an irregularity, in considering the validity of the election, as though it were placed miles away and in another part of the city; and that it is not incumbent upon the petitioner to satisfy the court by the evidence, that this or any other irregularity by the failure of any other duty on the part of any of the officers, thus made mandatory by the strict terms of the law, resulted in either depriving the electors who would have voted, from voting, or caused their

votes to be rejected; or that if the election had been regular in these respects the result would have been changed.

On the other hand, it is insisted by the contestee that the irregularities complained of, and which are conceded to have occurred, were not fraudulent, nor were voters misled or thwarted, or in any wise impeded in casting their ballots freely, nor were the irregularities in any wise prejudicial, nor would the results have been different had the irregularities, in respect to the placing of the booth and the receiving of the ballots, been strictly in compliance with the letter and terms of the statute.

The case has been very ably presented to the court in argument by learned, industrious and exceedingly capable counsel on both sides. As already stated, the case for the contestor is urged chiefly upon the proposition that the misplacement of the voting place and booth, by the direct order of the common pleas judge and the proclamation of the mayor, was such a fatal irregularity as to render the election on the 7th day of July, 1904, absolutely void, even in the absence of any fact disclosing bad faith, or deprivation by any elector of the exercise of his privilege on that occasion, and in the absence of any showing that the result, but for this misplacement of the booth, would have been changed.

It is further contended by the contestor that the order defining the limits of the residence district in which the vote is to be taken, based as it is upon the petition of the qualified electors of said district, constitutes it an arbitrary and artificial district, by no means a territory bounded by any well known political or geographical lines, and the statute being penal in its sanction and character, renders the certainty that the polling place or places shall be in, or within, such district absolutely mandatory, imposing a duty upon the public officers which can only be legally exercised in strict conformity to the terms of the statute itself. It is insisted that any other view would presumably lead to confusion and uncertainty among the electors. There might be a case in which an election was simultaneously being held in another designated residence district, bordering upon the residence district in question. While it is not claimed that any simultaneous election was being held in

1906.]

In re Petition of John F. Ammer.

an adjoining residence district on the subject of local option, it is insisted that the very possibility of such mischance and confusion reflects upon the importance, stringency and rigorous requirement that the polling place, or places, shall be clearly designated as *within* the district.

The situation, in the opinion of the court, does not demand that a more minute or detailed statement of the merits of this contest be given at this time. It would be an unwarrantable and presumptuous effort on the part of the court to follow the legal acumen and forcible logic which was manifested in the argument.

An examination of the law on the contest of elections, involved in this controversy, as it is presented in the judicial history of the United States, and by the adjudicated cases, is not a satisfactory excursion. The doctrine of the courts upon what constitutes a void, or voidable election, is not thoroughly settled. I have examined with great interest many of the leading cases presented by counsel in their arguments and briefs. Comparatively few decisions of the courts of Ohio have been cited by counsel.

It would be useless and unsatisfactory for the court to indulge in any critical animadversions upon the legislation of the state of Ohio, in its attempt to regulate the traffic in intoxicating liquors. The last of these legislative efforts has produced an act which is becoming every day more fruitful of contentions in the legal forum, and will continue to fill the calendars of courts with controversies, probably, for many years to come. It is my purpose, in stating the brief conclusions which the court has reached, to point out only the divergent lines upon which the decisions seem to be marshaled. It may be stated, as a general proposition, that very many, if not all, of the cases cited, are decisions rendered in construing special acts and statutes of the several states from which the cases are reported, and in determining the weight and authority, therefore, of such adjudications. it is absolutely necessary to understand the facts and legislative enactments and powers which are dealt with by the court.

One of the strongest cases cited by the contestor is the decision of the Supreme Court of Illinois, rendered in 1893, the

case of *Snowball v. The People, ex rel*, 147 Illinois, page 260.

This was an election for a member of a school board, the election being appointed and fixed by order of the board of education of a school district in St. Clair county, Illinois. In this case, the law required the election to be held in a certain school district, the territory lying partly within, and partly without, the municipal corporation. Quoting now from the statement made in the report, I read as follows:

"The board of education also caused notices of the election to be posted, but did not at its said meeting or at any other time fix any polling place within the territory lying outside of the city, and appointed no judges or clerks for said territory. At eight o'clock on the morning of the day of election the president of the board of education, with the consent of the other members, repaired with the ballot box to the Allerton House, located in said outlying territory, and, in accordance with his statement to them that they had a right to do so, seven voters there assembled, selected two of their number as judges and one as clerk, who were duly sworn by a notary, and took charge of the ballot box and cast their own votes, and received those of the others; and, at said Allerton House, seven votes were cast for appellant, and none for relator."

In deciding the case, Mr. Justice Magruder states the following facts on page 267:

"By an act of the Legislature approved and in force on March 23, 1887, and which was in force when this election was held, it is provided that, in all elections thereafter held for school district purposes, in any school district lying partly within and partly without any city which had adopted or might adopt the election law of June, 1885, above referred to, the legal authorities of such school district 'shall locate the polling place or places, appoint the judges and clerks, and otherwise conduct the election in that portion or part of the * * * school district that lies without such city,' etc. (3 Starr & Cur. Ann. Stat., page 561; Hurd's Rev. Stat. of 1885, page 665). It is conceded that the school district in the present case is under the control of a board of education. The legal authority, therefore, whose duty it was to locate the polling place or places was the board of education. By the provisions of the school law it was required that the board of education should give at least ten days previous notice of the time and place of holding the election. As has already been stated, the board did not fix

1905.]

In re Petition of John F. Ammer.

the polling place or places, and, as we understand the facts, the notices posted did not designate any place for holding the election.

"It is essential to the validity of an election that it be held at the time and in the place provided by law (McCrary on Elections, 3d Ed., Sec. 118). Where the time and place are not fixed by law, but are fixed by some authority named in the statute, it is essential to the validity of the election that the time and place be fixed by the very agency designated by law, and none other (*Stephens v. The People*, 89 Ill., 357). In *Williams v. Potter*, 114 Ill., 628, where it appeared that the statute required the polling places, when more than one was demanded by the excess of the number of voters over those voting at the last preceding general election, to be fixed by the county board, and that a school house, where certain votes were cast at an election, had not been designated or appointed by the county board as a polling place, it was held that such votes could not be counted; and the following language used in that case is applicable to, and decisive of, the case at bar: 'A number of voters of the township assemble at a place unauthorized by law, organize and hold an election for town officers, and the question is, shall the votes cast at such election be counted? * * * It is clear, upon the plainest principles of law, they can not be so counted. The whole thing, however, well intended was, in contemplation of law, illegal and void' (*The People v. Gochenour*, 54 Ill., 123)."

It will be observed, by even a superficial view of this decision, that the irregularities and omissions of duty on the part of the board of education, the manner of conducting the election and the few votes that were cast, all concurred to establish a strong case of prejudice, and the whole purposes of the election were, by these irregularities and omissions, substantially thwarted, and the election was rendered abortive. It is but another illustration of the truth of the statement that, in order to understand the force and effect of such adjudications, not only the special statutes which are being administered must be fully understood, but the facts and circumstances of the special case must be kept constantly in view. It is, for this reason, very difficult to adduce any general principle or rule out of these conflicting decisions.

The state of the law, as touching liquor legislation and the application of local option in the state of Texas, is thoroughly

settled in favor of the contention of the contestor. The case, *Ex parte Conley*, decided by the Court of Criminal Appeals of Texas, and reported in the 75 Southwestern Reporter, page 301, is a case which clearly demonstrates the fact that the law, as settled in Texas, is peculiar and apart from the tenor of decisions in other states. I will simply quote a paragraph from the decision of the presiding judge:

“The main proposition suggested for reversal is that the local option law is invalid because the notices of the election were not posted in accordance with the terms of the statute. Four of the five notices were posted the requisite number of days. The fifth was not. The election was conceded to be fair, and that no actual injury resulted from the failure to post the fifth notice the requisite number of days. So we have the proposition, sharply put, that the law is invalid by reason of the failure to post one of the five notices the legally required number of days (twelve). The fifth notice was posted nine days. Appellant contends this renders the law invalid, although the election was conceded to be fair; that the statutory prerequisite steps to put the law in operation are mandatory, and without a compliance therewith the law would be invalid; that the posting of the notice is necessary before the people have the right to assemble and vote on the question of local option. It is asserted, and it may be true, that the authorities in the different states are divided upon this proposition. However, they are not divided on the proposition in Texas, unless it is made so by the recent case of *Norman v. Thompson*, 72 S. W., 64: 6 Tex. Ct., 641. The question is not novel, and, in one form or another, has frequently been before the courts of last resort in this state. In *Kramer's Case*, 19 Tex. App., 123, it was said: ‘If the election was not conducted in accordance with the requirements of the law, it is void, and not merely voidable, and all proceedings had under and by virtue of such void election are absolutely void, and may be questioned not only directly, but collaterally.’ ”

It seems, from this decision and from others in the state of Texas, that different municipalities and places in Texas may adopt what is called the local option law, by virtue of a general enabling statute, so that the election results virtually in an act of legislation; whereas, under our system, an election is merely the application or administration of a law, general in its operation throughout the state wherever invoked. The rule as to the formality and regularity of an election, then, held under our

statute, should be deduced from the statute itself, and from the general principles of law relating to elections, where the same are applicable (Black on Intoxicating Liquors, Section 97). It, therefore, appears to be the duty of the court to scan closely the decisions of our own state courts, and so far as they are applicable to the issue involved, give them force and effect, rather than the decisions of other states which have special reference to the policy and legislation of such states.

The case of *Sidney B. Foster v. William D. Scarff*, 15 O. S., 532, is cited by counsel as a strong case in support of the contestor's contention. In this case the proclamation of an election, which the law required to be made by the sheriff, failed to announce that a probate judge was to be elected in the county of Logan, state of Ohio. This failure to give publicity to the election of a probate judge resulted in a very small vote for the person who was a candidate for the office, the people generally believing that there was no vacancy to be filled in that office. The whole number of votes cast in the county was 4,339. Nine hundred and thirteen votes were cast for the person who claimed the election as probate judge, and in four or five townships out of the seventeen, no votes were taken at all on the subject. The decision of the court, stated in the syllabus, is as follows:

"Where a vacancy is about to occur in the office of probate judge, by reason of the expiration of the term of an incumbent of that office, and the sheriff, in pursuance of the statute, in due time prior to the day for the regular election, published his proclamation, giving notice of such election, and enumerating therein all the state and county offices to be filled at such election, except the office of probate judge, in respect to which the proclamation is silent; and, by reason of such misfeasance of the sheriff, the great body of the electors of such county are misled, and have no notice, either official or in fact of an election to fill the office of probate judge; but, nevertheless, a small number of the electors of the county, less than one-fourth of the whole number of voters at that election, cast their votes for a single candidate, and no votes are cast for any other—such attempted election is irregular and invalid."

But the court especially limits the case to the facts involved, and on page 537 the judge deciding the case uses the following language:

"In deciding this case, however, we do not intend to go beyond the case before us, as presented by its own peculiar facts. We do not intend to hold, nor are we of opinion, that the notice by proclamation, as prescribed by law, is *per se*, and in all supposable cases necessary to the validity of an election. If such were the law, it would be in the power of a ministerial officer, by his misfeasance, always to prevent a legal action. We have no doubt that where an election is held in other respects by law, and *notice in fact* of the election is brought home to the great body of the electors, though deprived through means other than the proclamation which the law prescribes, such election would be valid. But where, as in this case, there was no notice, either by official proclamation or in fact, and it is obvious that the great body of electors were misled, for want of the official proclamation, its absence becomes such an irregularity as to prevent an actual choice by the electors, prevents an actual election, in the primary sense of that word, and renders invalid any semblance of an election, which may have been attempted by a few, and which must operate, if it be allowed to operate at all, as a surprise and fraud upon the rights of many."

The court has examined the leading authorities presented by counsel in their exhaustive, diligent and searching arguments in this case. The conclusion to which the court seems forced to arrive will not justify an attempt to analyze, or even present a condensed statement of the force and effect of these decisions. In New York, Illinois, California, Missouri and other states, where there is some slight conflict, it appears to the court that the stronger and best adjudications establish the proposition that the important question in such cases is, have the qualified electors been deprived of a fair opportunity of expressing their preference; and that mere irregularities which do not affect the result should be disregarded (31 Cal., 173; 58 Cal., 209; 8 N. Y., 69; 32 Texas Criminal Appeals, 553; 78 Ill., 170).

We are not without some judicial authority in the state of Ohio in construing the Brannock Law, and it appears that there is some conflict even in our own inferior courts. On the 3d day of October, 1904, the Honorable Probate Judge of Franklin County, Ohio, in the case of *John F. Cole v. The City of Columbus*, 2 N. P.—N. S., 563, decided that the requirement of the Brannock Law that the mayor or common pleas judge, with whom the petition for a special election is filed, "shall order a

1905.]

In re Petition of John F. Ammer.

special election to be held in not less than twenty, nor more than thirty days from the filing of the petition," is mandatory, and that an election held thirty-one days thereafter is void, and will be set aside.

The judge, in his decision, enters into a full and exhaustive examination of the authorities, and concludes with the following language:

"Surely the framers of the 'Brannock Law' and the Legislature which passed it, intended that some meaning should be given to the words 'in not less than twenty days and not more than thirty days from the filing of such petition;' they intended that the law should be operative, and that courts should so construe it as to make it not only operative, but effective, and give the petitioners some remedy against any one seeking to obstruct its operation at any point."

In deciding the case, the honorable judge overrules two decisions made by the common pleas court, holding that the time limit provided for in the statute was merely directory. These decisions are found in 2 N. P.—N. S., 469 and 245. The learned judge overruled the superior court because the judges gave no reasons for their opinions, and cited no authorities. My attention was called to this case in the probate court by counsel for the contestor, after the argument, the claim being made that, in respect to the section as to calling the election, the requirement was of the same nature as that requiring the polling places to be designated within the district, and that if, in one case, the law was mandatory, it could not be merely directory in the other.

The Court of Common Pleas of Montgomery County decided June 15, 1904, *In re Petition for Election in Precincts C. D and E, Fourth Ward, Dayton*, 2 Nisi Prius—New Series, 245, that the provision of Section 1 of the Brannock Law, limiting the time within which the mayor or judge of the common pleas court may order an election to not less than twenty nor more than thirty days, is not mandatory, but directory.

Nothing more aptly illustrates the vague, confused and uncertain legislation of the Brannock Law than this decision of the Court of Common Pleas of Montgomery County. The grave issue was made and presented in the case, that bill boards oc-

1906]

In re Petition of John F. Ammer.

cupying the frontage of lots within a proposed local option district was "property devoted to manufacturing, mercantile, or other business purposes," in the meaning of the statute. The court set about deciding whether bill boards and fences upon which advertising matter had been placed constituted residence or business property. Thus we have in Ohio two decisions of recent date, and by two several courts, directly in conflict on the point that this Section 1 of the Brannock Law, which fixes the time for the election, is, in one case mandatory, and in the other, it is directory merely.

In this proceeding the constitutionality of the Brannock Law is challenged. It is not the purpose of the court to enter into any original construction of this proposition. The law has come before some of the courts in this state several times on the question of its constitutionality, and, as I am informed, that question has been settled in favor of the law. On July 1, 1904, the Circuit Court of Franklin County rendered a decision in the case of *Jeffrey, Mayor v. The State of Ohio, ex rel*, 4 Circuit Court—New Series, 494. The law was challenged in this case on the ground that it contravened Section 1, Article V., of the Constitution, which provides that every citizen having the qualification of an elector shall be entitled to vote at all elections. It was contended that this law came in conflict with this provision in the qualification of the electors, restricting the body of the electors to those in municipal corporations having registration to registered voters only. The court sums up its decision in the following language:

"The Brannock Law is not rendered invalid by reason of the possibility that certain persons may be disfranchised at an election thereunder, by reason of the construction which may be given to Section 2926 of the election law. Courts will presume that the true construction of the statute will be adopted, and the election so conducted as to give every elector an opportunity to register and vote."

As cited by counsel for the contestee, two of the laws preceding the Brannock Law, attempting to regulate the traffic in intoxicating liquors in the state of Ohio, known respectively as the Beatty Law and the Beal Law, have come under the scrutiny of the inferior and Supreme Court of the state of Ohio, as

touching their constitutionality. The Beatty, or Township Law, was upheld in the case of *Gordon v. The State*, 46 O. S., 607, and *Stevens v. State*, 61 O. S., 597. The Beal Law, so called, came before the court of common pleas and circuit court in a number of unreported cases, but its constitutionality was directly challenged in *The State, ex rel Lloyd, v. Dollinson*, in the Circuit Court of Guernsey County, and its constitutionality was sustained.

As a general practice it may be said to be as ungracious as it is inappropriate, for a court of inferior jurisdiction to deal with the constitutionality of any law when the same is merely dubious and uncertain. One of the most serious strictures which can be made upon the Brannock Law is the attempt to define what shall constitute the residence district in which the principle of local option can be applied. The erection of such a district is left to the unskilled hand of the forty per cent. of electors who see fit to frame the petition. The limits and lines of such district are entirely arbitrary and artificial, and the ease and facility by which districts may be laid off in such a way as to create void places, called "pockets," in which the citizens are substantially disfranchised on this question of local option; involved, confused and ambiguous construction of this provision of the law, as well as other features, lays this law open to serious impeachment.

No scheme of legislation better illustrates the futility, as well as danger, of enacting laws in the heat and intensity of political passion. This law was ground out between the upper and nether millstone of antagonized public sentiment, dividing the Legislature along lines purely partisan and vindictive, and finally modified by the supervision of pliant and trimming politics.

The court, however, can not say that the law is either unconstitutional or invalid.

By the 11th section of the Brannock Law, it is made the duty of the probate judge, upon the filing of the petition for the contest, to issue a summons addressed to the mayor of such municipal corporation, of the filing of such petition, and directing him to appear in said court on behalf of said residence district at the time named in the summons, which time shall not be more

1905.]

In re Petition of John F. Ammer.

than twenty days after the election, nor less than five days after the filing of such petition. Thus, the contest of an election becomes virtually, under our law, an action *inter partes*, and the burden of establishing the irregularity under this law, which

To me, the alarming and grave part of this section is that is claimed to render the election invalid, is upon the contestor. part which says that the probate judge shall have final jurisdiction to hear and determine the merits of the proceedings. Some relief is granted in the following clause of this section, which states that in all respects in the procedure of the hearing, he shall be governed by the law providing for the contest of the election of a justice of the peace, so far as such law is applicable. The attention of the court is called to this statute providing for the contest of an election of a justice of the peace. Section 576 of the Revised Statutes provides that "no election of a justice of the peace shall be set aside by the freeholders (called to try the case) merely because illegal votes have been given at such election, if it appears that the person whose election is contested has the greatest number of the legal votes given at such election, after deducting all illegal votes given when there is no evidence for whom such illegal votes were given, as well as all illegal votes which are shown to have been given for the person whose election is contested."

There is at least a slight suggestion in this statute, so far as it is applicable to the case at bar, that unless it clearly appears to the court that the irregularity or omission in the preliminary duty of the officer appointing the election, resulted in the vote which determined the election, it is not so material a defect as to render the election void.

The polling place at the corner of Giddings and Lexington avenues was sought by electors of the district which was holding the election. It was in plain view, and no other election was proceeding in any contiguous district or territory. It was fifteen feet beyond the easterly line of the district. There are no facts to justify the conclusion that any elector was misled or confused as to the proceedings on the 7th day of July, 1904, at that election. Considering the number of electors in the district, the election was carried by a decided majority. And now for the probate judge, in the absence of any facts showing fraud

or prejudice to the public, or individuals, of any sort or kind, to set aside the will of the people of the district, thus expressed, would be an exercise of judicial power under this statute which, in my judgment, would be grossly unjust and unreasonable.

There are other points made in this controversy on the question of the regularity of this election, which were not strenuously urged by counsel in argument, but which have received some attention on the part of the court.

It is claimed that the district was not properly and clearly bounded by the description in the petition of forty per cent. of the electors, nor in the order or proclamation. No facts are brought to the attention of the court, and the statute which requires a description of a residence district is so involved, confused and ambiguous that it is very difficult to tell exactly what it does mean.

The illegal voting, upon which evidence was adduced, consisted largely in the irregularity of failing to record the name of the voter as his vote was cast early in the election, in the voting place which was admitted to have been located within the residence district in question, and allowing the voter to write his own name upon the secondary stub. But there is no claim or pretense as to what number of irregular votes were thus cast, or whether any person was prevented from voting by this irregularity, or that the result of the election was affected one way or the other, and, as I understand counsel, it is admitted in argument that they do not urge this irregularity as one of the reasons for contesting the election.

The petition, therefore, to contest the election on the 7th day of July, 1904, in the 16th District, so-called, is hereby dismissed at the costs of the petitioner.

Olds & Willett and Wilcox, Collister, Hadden & Parks, for the petitioner.

Newton D. Baker, City Solicitor, for the Mayor of the City of Cleveland.

Albert V. Taylor, for qualified electors of the residence district, defending the election.

WHAT IN OHIO CONSTITUTES AN APPEARANCE.

[Common Pleas Court of Lorain County.]

J. G. BLINN v. CLAUDE M. RICKETT.*

Decided, April 7, 1905.

Appearance—Motion to Dismiss Does not Constitute, When—Language of the Motion—And Intention of the Party Making it.

A motion to discharge an attachment for the reason that the affidavit upon which it was issued is false and the facts therein alleged untrue, does not confer jurisdiction; and it appearing that the affidavit furnishes no ground for the attachment, a dismissal of the suit as well as of the attachment may properly be entered.

WASHBURN, J.

The case of Blinn v. Rickett comes into this court on a bill of exceptions from the docket of Charles C. Lord, justice of the peace.

It appears from the bill of exceptions and the papers filed in the case, that Mr. Blinn, who is a non-resident of Lorain county, sued Mr. Rickett, who is also a non-resident of Lorain county, upon a note which was given for commercial fertilizer, and that an affidavit was filed, and attachment issued and served upon the railroad company which employed Rickett, and which ran through Lorain county. The railroad company, as garnishee, answered that it had money or funds in its possession belonging to the defendant.

Thereupon the defendant filed the following motion in the justice court:

“Now comes the defendant herein, and moves the court to discharge the attachment issued herein, for the reason that the affidavit upon which said attachment was issued is false, and the facts alleged therein untrue.”

*Affirmed by the Circuit Court, May 8, 1905, 6 C. C.—N. S., 518.

1905.]

Blinn v. Rickett.

It appears from the evidence that was submitted to the court upon that motion, that the affidavit was untrue in all of its particulars, except that the defendant was a non-resident of Lorain county; that the claim was not for necessities; that the defendant was not a single man, but on the contrary was the head and support of a family, wife and children, living with them and supporting them.

The justice upon the submitting of the motion, sustained the motion and discharged the attachment, and thereupon dismissed the case.

And it is claimed now, not that the justice erred in dismissing the attachment, because the evidence is overwhelming that it should have been dismissed; but it is claimed that the justice of the peace erred in dismissing the case, for the reason that by filing said motion the defendant had entered his personal appearance in the action, and the action should thereafter have proceeded to judgment against him personally, although no property of the defendant was rightfully under the control of the court.

And that raises the question, what constitutes in Ohio an appearance to an action?

Now it is well settled by many adjudicated cases in the Supreme Court of this state, that where a person files a motion, demurrer or answer, which involves the merits of the case in any way, he thereby enters his appearance, although he specifically protests that he does not enter his appearance; that is so, I say, if the motion or other pleading goes to any other thing in the case, except the jurisdiction of the court over his *person*; he enters an appearance, if the pleading filed involves the merits of the case in any way. That is, if he should file a motion objecting to the jurisdiction of the court as to the subject-matter, that would be an appearance, personal, and if it was decided that the court had jurisdiction of the subject-matter, then the party filing such motion would be in court for all purposes.

Now a motion to discharge an attachment is not a motion to the merits of the case; there are some authorities in Ohio, to

that effect, although at the hearing of this case none were cited.

In the 7th Ohio Decisions, reprint, page 476, there is a decision by the district court, which was composed of Judges Avery, Burnet, Cox and Longworth. The syllabus of that case is:

“Appearing before a justice and moving for the discharge of an attachment issued on the ground of concealment, so that service can not be made, is not entering an appearance.”

It appears in that case, however, and the record recites the fact that the motion contained a protest against entering his appearance. In the decision the court said:

“The defendant came into the court and moved that the attachment be discharged, and failed in his motion. In no other way did he enter an appearance. No doubt a party may appear to question whether the court has obtained jurisdiction over his property or person, and for that purpose alone, and the record recites that was the fact.”

It only differs from the case now being considered by the fact that this motion is not limited in its nature.

Then in the 11th Ohio Decisions, at page 418, the syllabus of the case reads:

“An appearance for the purpose of a motion to dismiss the attachment, upon the ground that as no property has been attached, the court had not acquired jurisdiction of the subject-matter, does not confer jurisdiction to render any judgment whatever.”

The court in deciding the case said:

“Upon the hearing came the defendant by his counsel, and without entering his appearance herein, and without waiving any of his rights, and for the purpose of this motion only, moves the court to dismiss the attachment herein and to release the property claimed to have been attached and garnisheed in this proceeding, for the reason that the said goods are not subject to attachment or garnishment, as the same were in transit at the time of the purported attachment and

1905.]

Blinn v. Rickett.

garnishment thereof, and for the further reason that the order of attachment was not made effective by attachment of the property, and the court therefore has no jurisdiction of the subject-matter.' The magistrate overruled the motion, and found that the appearance of the defendant was entered because of the filing of said motion, and entered a personal judgment against him for \$293.59, the amount of plaintiff's claim and interest and for costs. The defendant prosecutes these proceedings in error, claiming that the magistrate erred in overruling his motion to dissolve the attachment and in entering personal judgment against him. It is clear that the magistrate could not properly render a personal judgment against the defendant as upon his appearance in court. There is ample authority for a proceeding, such as was defendant's, to obtain a discharge of the attachment, appearing for that purpose only."

It will be observed in this case also that the appearance was limited in the motion.

In 2 C. C., at page 118, is a decision, which was rendered by Judge Shauck when he was on the circuit. In that case a suit was brought, an attachment was issued, and the defendant, Saxton, without submitting himself to the jurisdiction of the court for any other purpose, moved for a discharge of the attachment for reasons stated in his motion. The court overruled his motion to discharge the attachment, and he prosecuted error to the circuit court, and, after the error proceeding was filed in the circuit court, desiring to have his property discharged, he gave a bond, and the property was discharged, and upon hearing it was claimed that by the giving of that bond, and by the motion that the judge passed upon, he entered his appearance, and the court, in deciding it, said:

"The plaintiff in error was not served below, nor did he formally enter his appearance, nor by any act submit himself to the jurisdiction of the court. He has not acknowledged the validity of the attachment proceedings, nor authorized his adversary to take any step in the belief that their validity would not be contested. We, therefore, find no ground upon which he can be held to be estopped from insisting that his property was wrongfully taken."

Of course, prosecuting error, unlike appeal, never enters appearance. In other words, appealing a case is entering an appearance, prosecuting error is not.

It will be observed in this case also the appearance was limited in the motion.

Then in the 39th O. S., at page 249, the court said in the syllabus:

“The appearance of a defendant in court for the sole purpose of objecting by motion, to the jurisdiction of the court over his person, is not an appearance in the action or a waiver of any defect in the mode or manner by which such jurisdiction is obtained.”

Now from the authorities that there are in Ohio, if the defendant had, in the case at bar, limited his appearance in his motion, I would have no trouble whatever in arriving at a conclusion in the case.

The only uncertainty, is as to whether he should have protested in the motion that he appeared only for the purpose of having the attachment discharged. And it seems to me on that point, that this 39th Ohio State has some bearing. It appeared in that case that it was a motion before a justice of the peace, and the motion was in this language:

“And now come the said defendants, for the purpose of this motion only, and expressly disclaiming any and all intention or purpose of making or entering an appearance upon the merits of this case, or for any other purpose save for that contained in this motion, and here moves the court to dismiss this action, discharge the garnishee herein, and dissolve the attachment issued herein, for the following causes, to-wit: That said justice of the peace has no jurisdiction of the person of said defendants, or either or any of them. That the said justice of the peace has no jurisdiction of the property of said defendants. That no service has been made upon defendants as required by law.”

That motion was overruled, and a second motion was thereupon filed in this language:

1905.]

Blinn v. Rickett.

"And now come the said defendants, and for the purpose of this motion only, and disclaiming all intention or purpose of entering any appearance in this cause as to the validity or invalidity of the causes of action sued upon, but appearing for the purpose of this motion, and for no other purpose, and waiving none of the rights of defendants herein, here moves said justice of the peace to discharge the attachment hereinbefore issued in this case, and dismiss the action, for the following reasons, to-wit: That said affidavit in attachment is insufficient in law to maintain an attachment or justify the issuing of an order of attachment, and can confer no jurisdiction upon said justice in this action, either of the person or property of said defendants."

And that motion was overruled. Error was prosecuted to common pleas court, where the judgment of the justice was affirmed. But the district court reversed the common pleas court, and then the case was taken to the Supreme Court. In deciding the case the court said:

"It is not claimed that a voluntary appearance was entered by the defendants; but the claim is, that the filing of said motion was, in law, an appearance to the merits of the cause, and, consequently, a waiver of any objections to the mode or manner by which jurisdiction over the person of defendants was acquired. The appearance of a defendant in court for the sole purpose of objecting, by motion, to the mode or manner in which it is claimed that jurisdiction over his person has been acquired, is not an appearance in the cause, or a waiver of any defect in the manner of acquiring such jurisdiction; while, on the other hand, the appearance for the purpose of contesting the merits of the cause, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, *whether the defendant intended such waiver or not*. The motions of defendants, which are relied on as an appearance in the original action, *when considered in the light of the circumstances disclosed in the record*, were objections to the jurisdiction of the court over the persons of the defendants, and nothing more."

Now the test seems to be, not what he *said* was his intention in his motion; but what in fact *was* his intention, gathered from the surrounding circumstances.

In the case of *Elliott v. Lawhead*, 43 O. S., page 171, the defendant filed the following motion:

"Charlotte Elliott, the defendant above named, by her attorneys, now comes for the purpose of this motion and for no other purpose, and moves the court to strike the above named case from the docket of said court, and the petition from the files, for the want of legal and proper service, and because the said court has no jurisdiction of the subject-matter of said action or of debt, and for the same reason that all proceedings herein by said plaintiff against her be dismissed."

The court in deciding the case, on page 177, said:

"It is true the defendant 'comes for the purpose of filing this motion and for no other purpose,' and had the motion been confined to the want of proper service it would not have operated as an appearance. It was not so limited, but embraced an additional reason, to-wit, the right of the court to hear and determine the subject-matter. The rule is that where a defendant appears solely for the purpose of objecting to the jurisdiction of the court over the person, such motion is not a voluntary appearance of defendant which is equivalent to service."

"Where, however, the motion involves the merits of the case made in the petition the rule is otherwise."

It will be noticed in this case, that the defendant limited her appearance in her motion, but the court held that the motion constituted her appearance, notwithstanding she protested against appearance in the motion. The court looked beyond the motion, and decided that in the light of all the circumstances, the defendant did enter her appearance, notwithstanding her protest.

It has seemed to me that in the case at bar, this court ought to consider the object of the motion filed in this case, and determine what the defendant's intention was, as to appearance, by what the record discloses, notwithstanding the fact that he did not limit his appearance in his motion.

It is clear in the present case that the only object and intention of the defendant in filing his motion was to object to the jurisdiction of the court over his person, and to *prevent* the

1906.]

Blinn v. Rickett.

court obtaining jurisdiction over his person or property, and I believe that these decisions justify the court in holding that what he said or did not say in the motion, as to the extent of his appearance, would not govern; but that the court is governed by what the record discloses was his real intention as to appearance. I may be mistaken as to this, but I am satisfied this county, when it was conceded that the grounds of attachment were untrue, with the exception of non-residence, and I that the justice of the peace did the right thing in this case.

It was an abuse of the forms of law to bring this action in believe that I ought to affirm this judgment. An entry in this case will be made affirming the judgment of the justice, and I will give you an exception if you desire.

Fritz Ruding, for plaintiff in error.

Clayton Chapman, for defendant in error.

1905.]

City of Columbus v. Cole.

**TIME WITHIN WHICH AN ELECTION MUST BE HELD UNDER
THE BRANNOCK LAW.**

[Common Pleas Court of Franklin County.]

THE CITY OF COLUMBUS v. COLE.*

Decided, July, 1905.

*Liquor Laws—Directory and Mandatory Provisions of Statutes—Time
Within Which an Election Must be Held Under the Brannock Law,
Mandatory.*

The provision of the Brannock Law that an election shall be held in not less than twenty or more than thirty days after the filing of the petition is mandatory, and compliance therewith is essential to the validity of the election.

BIGGER, J.

This is a proceeding on error from the judgment of the probate court in an action brought under the provisions of the Brannock Local Option Law to contest the validity of an election held in a residence district in this city under that law. The decision of the probate court was in favor of the plaintiff, the defendant in error here, and the judgment of the probate court was that the election was null and void. One of the grounds upon which the court below based its judgment was that the election was not held within the thirty days limit fixed by the statute and that raises the first question presented for decision here.

It is conceded that the election was not held within the thirty days limit, but was held thirty-one days after the filing of the petition. Did this render the election null and void? It is the contention of the plaintiff in error that this provision of the statute is directory merely, and that it is not essential to the validity of an election under the Brannock Law that the election be held within thirty days after the filing of the petition.

After a careful examination of the question here presented,

*Affirming 2 N. P.—N. S., 563, as to mandatory feature of the law; for contrary holdings as to mandatory feature, see 2 N. P.—N. S., 245, and 2 N. P.—N. S., 469.

I have reached the conclusion that upon principle and the weight of authority this provision of the law is not directory but mandatory, and that it is essential to the validity of an election held thereunder, that it be held within the period fixed by statute. And in the first place it is a general rule upon the subject of elections that time and place are of the substance of every election. Am. & Eng. Enc. of L., Vol. 10, 679; *Dickey v. Hurlburt et al*, 5 Cal., 343; *Stevens v. The People*, 89 Ill., 337.

It is claimed that where a statute requires something to be done by an officer within a certain time for a public purpose that the requirement is to be considered as directory only, and if the duty be neglected within the time prescribed, but be afterwards performed, that the public shall not suffer on account of the delay. Counsel cite the case of *Tonsey v. DeHuy*, 62 S. W. R., 1118, a Kentucky case, in support of the claim that this principle of law is applicable to a case of this kind, and it may be conceded that this case supports the claim of the plaintiff in error.

Attention is also called to the fact that by our statute there is a requirement that the polls be kept open during certain hours on election day, and that it has been held that it will not vitiate an election if the polls be not opened or closed at the particular hours specified where no fraud has been practiced and no substantial rights violated. Chief Justice Beatty, of the Supreme Court of California, in the case of *Packwood v. Brownell*, 121 Cal., 481, in considering this question, says that:

"The requirements as to time and place of holding elections are certainly mandatory. But time in this connection means the proper day for holding the election and does not mean that the polls must necessarily be opened at the hour of sunrise on that day. A slight delay in opening the polls, explained and excused by the absence of one of the officers, etc., ought not to disfranchise the voters of a precinct in the absence of any showing of actual injury."

My attention is also called to the fact that two of the common pleas judge of this state have held, in ordering an election

1905.]

City of Columbus v. Cole.

under this law, that this requirement was only directory. As to that, it is to be observed that the report of those decisions is upon that point very brief, and no authorities are cited in support of the decisions upon that point, but it seems to me that the decided weight of authority as well as the better reason supports the claim of the defendant in error that this requirement is mandatory and not merely directory, and that it is essential to the validity of an election under this law that it be held within the time prescribed by statute. The following authorities support the claim of the defendant in error upon this proposition: 19 Am. & Eng. Enc. of L., p. 503; 10 Am. & Eng. Enc. of L., p. 679; *Boone v. The State*, 10 Texas Ap., 418; *Yares v. The State*, 59 S. W. R., 275; *Hayes v. The State*, 33 Texas Crim., 547; *In the matter of R. S. Woolridge*, 30 Mo. Ap., 612-618; *State, ex rel, v. Ruark*, 34 Mo. Ap., 325; *State of Nevada, ex rel, v. County Commissioners*, 6 Nev., 104; *Stevens v. The People*, 89 Ill., 337; *Gassard v. Vaught*, 10 Kas., 162.

This last case, which was not cited by counsel, is to my mind especially persuasive upon this question. The opinion in the case was delivered by Justice Brewer, then a judge of the Supreme Court of Kansas. The statute in that case required that an election should be ordered by the county commissioners within fifty days after the presentation of a petition containing the required number of signatures. This was not complied with, and the court held that an election held at a later date was null and void. The syllabus is:

“An election for the re-location of a county seat must be held within fifty days after the presentation of a petition therefor or it is void.”

It will be found from the report in this case that substantially the same arguments were there advanced in support of the validity of the election that are made here. The argument of Judge Brewer in the opinion holding that this provision is not directory merely but mandatory, seems to be entirely pertinent here, and I cite it without stopping to quote from it at length.

The question as to what requirements of a statute are directory merely, and what are mandatory, is one oftentimes of much difficulty, but in the light of the authorities upon this question, I am of the opinion that the requirement of this statute is not directory merely, but mandatory, and that the decision of the probate court in holding that this election was null and void was correct, and judgment is affirmed. This makes it unnecessary to consider further questions raised and discussed in this case.

W. B. Wheeler, for plaintiff in error.

Gumble & Gumble, for defendant in error.

**WITHDRAWAL OF PETITION UNDER BRANNOCK LAW
AFTER FILING.**

[Common Pleas Court of Franklin County.]

THE CITY OF COLUMBUS V. PATRICK GLACKIN.*

Decided, July, 1905.

Liquor Laws—Withdrawal of Petition for Election under Brannock Law—Change of Boundaries—Assent of Signers to Refiling.

A petition for an election under the Brannock Law may be withdrawn, and the boundaries of the proposed district changed, and the petition refiled; and it is immaterial if in refileing the old sheets are used, without having the signers rewrite their names, provided only that the signers assent to the change in the boundaries, and constitute forty per cent. of the electors of the district so changed.

BIGGER, J.

This is another contested election case under the Brannock Local Option Law. The probate court rendered judgment in favor of the defendant in error, setting aside the election as null and void. It appears that in this case the petition was filed

* Reversing 2 N. P.—N. S., 563, as to right to withdraw petition; see same holding in 2 N. P.—N. S., 469, and as applied to a petition under the Beal Law in 3 N. P.—N. S., 17.

1905].

City of Columbus v. Glackin.

with a judge of this court, which was found to have exempt territory included in the boundaries. Upon application to the judge, leave was given to withdraw the petition, and a change was made in the boundaries, excluding this exempt territory, and the consent of forty per cent. of the qualified electors of the district was obtained to this change in the boundary, when the petition was refiled and an election ordered and held.

It was decided by the probate court that the petition having been filed could not be withdrawn and refiled. It seems from the record that the decision of the court was based upon this proposition that a petition could not be withdrawn, and boundaries changed and refiled, and the court refused to permit the defendant, plaintiff in error here, to show that the consents of the signers had been obtained. In this, I think the court below was clearly in error. I see no reason why the signers of a petition may not withdraw it if they see fit, and no authority is cited in support of such a doctrine. That individuals may withdraw from a petition before it is acted upon is too well settled to admit of controversy. It follows, therefore, that they may all withdraw, and that seems to be what was done here. If that be true, then the people may again petition, and that seems to be in effect what was done here.

The case decided by the Kansas City Court of Appeals, which is not a court of last resort, and which is cited in support of this claim, is not in point for the reason that it appeared in that case that a few of the petitioners without authority, as is clearly stated, from the great body of the petitioners, undertook to withdraw the petition. That is not this case. The petition was withdrawn and forty per cent. of the voters of the new district, it must be assumed, had petitioned for an election in the changed district. The presumption is when the election was ordered that forty per cent. of the voters in the new district had signed it. The defendant in error, plaintiff below, did not establish the fact that it was not signed by forty per cent. of the qualified electors of the new district, but on the contrary his own evidence shows that forty per cent. had signed. It was certainly valid as a new petition. It made no difference that they may have used the old sheets and without

having the signers re-write their names simply have them give their consent to a change of the boundaries and re-file it. It was in effect a petition of forty per cent. of the voters of a new district, and the election was properly ordered and held. For this reason, the judgment of the court below must be reversed.

W. B. Wheeler, for plaintiff in error.

Gumble & Gumble, for defendant in error.

**BRANNOCK LAW PETITIONS COVERING OVERLAPPING
TERRITORY.**

[Common Pleas Court of Franklin County.]

W. K. FULTON v. THE CITY OF COLUMBUS.

Decided, July, 1905.

Liquor Laws—Precedence of Brannock Law Petitions—Covering Overlapping Territory—Where the First was Insufficient when Filed—Orders as to Elections are Ministerial.

1. A petition for a Brannock Law election which is legally insufficient does not have precedence over a legal petition, covering overlapping territory, which is properly filed before the insufficient petition is made sufficient.
2. Orders made by judges for elections under the Brannock Law are merely ministerial and not judgments of the court, and hence may be reviewed by an associate judge, notwithstanding a rule against the review of the judgments of associate judges.

BIGGER, J.

This is also a proceeding in error to reverse a judgment of the probate court in an action in that court to contest the validity of an election held under the Brannock Law. The decision which it is claimed was erroneous was the judgment of that court in sustaining a demurrer of the defendant in error to the petition of the plaintiff in error in that court. The petition alleges in substance the following:

That on the third day of October, 1904, a petition for an election was filed with one of the judges of this court praying

1905.]

Fulton v. City of Columbus.

that an election be held in the district described therein. That a protest was filed against the petition, and that on or about October 17th it was found that forty per cent. of the qualified electors of the district described were not signers at the time when it was filed. That on the 14th of October, a petition was filed with another judge of this court, which contained forty per cent. of the qualified electors of the district at the time it was filed, which district covered a part of the same territory outlined in the petition filed on October 3d. That on the 17th day of October, the attorney for the petitioners filing the petition on October 3d asked for leave to file an additional petition with the names of fifty-three additional electors, which petition outlined the same boundary as that outlined in the petition of October 3d, and that over the protest of the petitioners of October 14th, this was allowed and the names of the additional signers were counted along with the names already on the petition, and finding that as thus supplemented, more than forty per cent. of the voters of the district were signers, an election was ordered in the district outlined in the petition of October 3d; that before sufficient names were added to this petition to make it contain the requisite forty per cent. of voters, the petition of October 14th, containing the requisite forty per cent. of electors of the other district containing the common territory, had been filed.

The plaintiff, upon this state of facts, prayed that the election ordered on the first petition, and held, be set aside, and that such further proceedings be had as are authorized by law. The court upon demurrer held this petition to be insufficient to entitle the petitioner to any relief.

The first section of the Brannock Law provides that when two or more petitions are filed and pending, each containing common territory, the election shall be ordered in the residence district described in the petition first filed. Will a petition which contained when filed less than forty per cent. of the qualified electors of the district, have precedence over a petition containing common territory, afterwards filed, which contained the requisite forty per cent., in case a sufficient number

of names be added to the insufficient petition to make it sufficient, after the filing of the second petition, which contained a sufficient number of names. In other words, can a petition legally insufficient have precedence over a legal petition containing over-lapping territory, properly filed before the insufficient petition is made sufficient?

In my opinion the proper construction of this law gives the precedence to that petition which is first filed, containing the legal number of qualified electors. A petition which does not contain such number of qualified electors is in law no petition at all, and I can not conceive how the signers of such a petition can acquire any rights thereunder which would give them precedence over a legally sufficient petition. Manifestly it seems to me when the law provides that when two or more petitions are filed and pending containing common territory, that precedence shall be given to that first filed, it means a legal petition, a petition containing the requisite number of voters.

Any other construction would lead, it seems to me, to absurd consequences and endless confusion. I think the Legislature never contemplated the filing of a petition which did not comply with the requirement as to the number of qualified electors. It is probably permissible to add additional names to a petition which it is found does not contain the requisite number, but I think this can not be done so as to defeat the rights of other petitioners which have intervened before the requisite number is secured. As counsel for plaintiff in error says, if this construction be correct, then all that would be necessary would be for a paper to be filed containing two or three names and thus hold the territory until enough could be secured to make it a legal petition. Such a proceeding, it seems to me, would be farcical. If this construction be placed upon the law, then all that would be necessary when either side to these contests learned that the other was circulating a petition, would be to prepare a petition covering the territory, add a few names to it and file it and then obtain the additional names at leisure. I think this construction is not reasonable, and against the legislative intention. For that reason, I conclude that the court below erred in sustaining the demurrer to

this petition, and the decision of the court below must be reversed, and the case remanded with instructions to overrule the demurrer.

In passing upon the question presented in these three cases, I am called upon to review the action of all three of my associates on the bench in ordering elections under this law. I was at first glance inclined to think that I ought to sustain their rulings without further investigation of the questions, under our rule that one judge will not undertake to review the orders and judgments of another judge of the same court. but the orders made by judges under this law are not the judgments or orders of the court, and I think the rule has no application to a case of this kind, and that it is my duty when called upon to act judicially in these cases thus brought up here for review, to decide them in accordance with what I conceive to be the law upon the subject and without reference to the orders for the holding of elections which are only ministerial and not the judgments of the court.

W. B. Wheeler, for plaintiff in error.

Gumble & Gumble, for defendant in error.

**CONTRIBUTORY NEGLIGENCE IN GOING UPON A WAY
KNOWN TO BE OUT OF REPAIR.**

[Superior Court of Cincinnati, General Term.]

JOHN L. PUCCINI v. CITY OF CINCINNATI.

Decided December, 1904.

*Negligence—Public Ways—Known to be Out of Repair—Which Can
Not be Easily Avoided—Questions of Law and Fact.*

Where one goes upon a public stairway in the night time, which he knows to be out of repair but is lighted by an electric lamp, and which he could not avoid without going three squares out of his way over partially improved streets, and when half way up, the lamp goes out while groping in the darkness he is injured, there is in his suit against the municipality for damages, a question of fact for the jury as to contributory negligence, and to take the case from the jury is error.

HOSEA, J.; HOFFHEIMER, J., and CALDWELL, J., concur.

Error to special term.

The suit below was for damages for injuries received while passing over a public way—being a flight of wooden steps leading from State avenue to Kineon avenue—which, through negligence of the city, had become defective and dangerous. In presenting his testimony, plaintiff admitted that the dangerous and defective character of the steps was known to him at and prior to the time of the injury. Coupled with this admission, however, was evidence of care and of the further fact that the steps afforded the only access to plaintiff's residence from below excepting over partially improved streets three squares around (approximately 1,200 feet). There was also testimony showing that the steps were ordinarily lighted at night by an electric light above; that when the plaintiff had gotten half way up the steps on the night in question the light went out, and he was compelled to proceed in darkness; also that he was proceeding carefully, realizing the danger, and had his hand on the banister as a guide when he fell and was injured.

1905.]

Puccini v. City of Cincinnati.

On the conclusion of the testimony for plaintiff the court, on motion, instructed a verdict for defendant, which action is assigned as error.

Starting with the familiar rule that contributory negligence is fatal to recovery (with certain exceptions not applicable here), the further rule has been adduced, namely, that where the proof required to establish plaintiff's injury includes clear proof of all the material facts relating to his conduct and duty, and those admit of no reasonable inference but that of negligence on his part, then the case presents matter of law for the decision of the court only (*Cleveland, C. & C. Ry. v. Crawford*, 24 Ohio St., 631, 634). But in the above case the court also establish the correlative rule as follows, page 638:

"The law in cases of mutual negligence is, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover (*Timmons v. Railway*, 6 Ohio St., 105). It is no case of mutual contribution to, an injury, where the injured party could not, by the exercise of due care, have avoided the consequences of another's carelessness."

The court follows this a little later with the rule of legal presumption above given, and states the antithesis of such rule as follows, page 640:

"But, on the other hand, if the testimony is conflicting, the facts uncertain, or the proper inferences to be drawn from the facts and circumstances doubtful, then it would be error for the court to withdraw the case from the jury, or direct them to return a particular verdict."

In the case of *Schaefer v. Sandusky*, 33 Ohio St., 246, the rule is applied in a case of a sidewalk rendered dangerous by ice. The facts were submitted to a jury and the court entered judgment on the special as opposed to a general verdict. The facts found were: (1), that the plaintiff knew the nature and character of the obstruction; (2), voluntarily passed over it; and (3), could have avoided it. The court here stated the law to be that, upon these facts shown, the injured party could not be regarded

as exercising ordinary prudence, and consequently could not recover because of contributory negligence. To reach this conclusion the court infer from the special findings that plaintiff could "easily" [sic] have avoided the obstruction, and held that "under such circumstances it was his duty to avoid the danger."

In *Village of Conneaut v. Naef*, 54 Ohio St., 529, in stating the point decided in *Schaefer v. Sandusky*, *supra*, the court say that the precise question left undetermined is, in substance, whether the rule applies where the source of danger is plainly visible as well as where it is actually known; and held that it does so apply.

The more recent utterance of the Supreme Court, in *Balt. & O. Ry. v. McClellan*, 69 Ohio St., 142, is the logical corollary of the cases cited, namely, that where the plaintiff's testimony raises a clear presumption of contributory negligence, and he offers no proof tending to rebut, it is the duty of the court to direct a verdict.

It will be obvious upon the state of the law, as shown in these cases, that the question of contributory negligence is usually one of law and fact, and that it is only in exceptional cases where the facts are so clear and undisputed that the question of law alone remains and the court is justified in overriding the functions of the jury as indicated in *Balt. & O. Ry. v. McClellan*, *supra*.

In the case at bar there seems to us to be at least one important question of fact to be determined upon the testimony and which is essential under the established rule, namely, the question whether the danger was one which could have been "easily" avoided. The court below seems to have assumed that to go upon a public way known to be out of repair and dangerous is negligence *per se*, but under the rule of *Schaefer v. Sandusky*, *supra*, this depends upon whether it can be "easily" avoided. The testimony in this case shows that the only alternative was to go around three sides of the square, over streets only partially improved. If the defective passageway could not be easily avoided, then the plaintiff was justified in going over it; and, being apprised of the danger, as is admitted, "he must exercise

1906.]

Puccini v. City of Cincinnati.

greater care in passing over them"—the defects—"or by them, than if they did not exist." 1 Shearman & Redfield on Negligence, Section 375.

The proper rule applicable to the case in hand, we think, is that stated in Beach on Contr. Neg., Section 274, as follows:

"When a highway is out of order it is held, as a general rule, not negligent to use it in as prudent a way as practicable, which is to say that it is not negligence as a matter of law. * * * But when the condition of the highway is such that it is obviously dangerous to go upon it, and it appears that the plaintiff might easily have taken another course and avoided the danger, there can be no recovery in case of injury. To go upon a highway under such circumstances is negligence sufficient to bar an action for damages. Mere knowledge, however, of defect or danger in the highway, on the part of the person injured thereby, is not conclusive evidence of negligence contributing to the injury; as, for instance, where one has proceeded so far in a narrow pass before being warned of danger ahead that he is unable to turn back."

In the present case there was evidence that the steps were illuminated when plaintiff approached them, and the jury could have found that, in view of the long way around as the only alternative, plaintiff was not negligent in entering upon them. If they were further satisfied—from the testimony to that effect—that the light went out when he was half way up, they might justly have concluded that it was a case of Hobson's choice whether to go forward or backward, and that under the circumstances of the case his conduct in going forward was not negligent. These were matters of fact for the determination of the jury, and we think it was error to deprive them of their function in this regard; consequently the action of the court below must be reversed and a new trial awarded, and it is so ordered.

Judgment reversed and new trial awarded.

W. C. McLean, for plaintiff.

Chas. J. Hunt, City Solicitor, for defendant.

ATTORNEY'S SHARE OF PROCEEDS OF LITIGATION.

[Common Pleas Court of Franklin County.]

**WILLIAM O. BAILEY v. THE TOLEDO & OHIO CENTRAL
RAILWAY COMPANY.**

Decided April 17, 1905.

Assignment—Of Interest in Litigation—Legal Services a Valid Consideration—Rights of the Assignee—Not Enforceable at Law—But in Equity After Notice to the Judgment Debtor.

While it may be that an attorney, who has a contract for a percentage of the judgment recovered or of the proceeds of settlement, can recover in an action in equity against the defendant, upon a showing that the defendant had notice of his said interest therein, such recovery can not be had in an action at law; and a motion by the plaintiff for a dismissal of the suit brought upon the claim will be granted over the protest of the attorney.

BIGGER, J.

In this case the plaintiff asks that his case may be dismissed, he having settled with the defendant. This is resisted by the attorney for the plaintiff, who claims that he has a contract for a share of the proceeds of the litigation either by way of settlement or judgment.

The Supreme Court of Ohio decided, in 58 O. S., page 362, in the case of *The Railway Company v. Volkert*, that legal services rendered by an attorney in the prosecution of a suit to judgment in the court of common pleas and a promise to perform further services if error proceedings should be instituted in the circuit court or the Supreme Court constituted a valid consideration for the assignment of one-half interest in such judgment, and the contract is not champerty. Such an assignment will convey to the assignee a property right in the judgment. This right is not enforceable in a suit at law at the instance of the assignee against the judgment debtor only, but may be enforced in equity, and it is not in the power of the judgment debtor after knowledge of such assignment to compromise with the assignor alone, and thus defeat the claim of the assignee to recover one-half of the proceeds of the judgment.

1905.]

Bailey v. T. & O. C. Ry. Co.

When, therefore, an attorney seeks to prevent such settlement, it must appear that the judgment debtor has notice. The attorney for the plaintiff in this case makes a professional statement that he had communicated this to counsel for the defendant. This professional statement is, however, rebutted by the professional statement of counsel on the other side that the statement only related to one case and not this or any of the cases which are now asked to be dismissed, and that no notice was given to the defendant of an interest in this case by the attorney for the plaintiff. In the case just cited it appears there had been a judgment rendered against the railway company and the judgment creditor thereupon assigned an interest in it to his attorney for his services already performed and for future services for proceedings in error. This right the court says was enforceable only in equity in case the defendant railway company had notice of the assignment. That is not this case. Whether or not such an agreement as this for an interest in a prospective judgment will entitle an attorney in the suit to have the case proceed, against the wishes of his client, to judgment in an action at law is another question. It is not, however, necessary now to discuss that, as the attorney for the plaintiff has not established a necessary fact to entitle him even in an action in equity to recover against the defendant, to-wit, that the defendant was informed of his interest.

The plaintiff's attorney states that he has a contract for forty per cent. interest in whatever settlement or judgment is obtained. Under the authority of the case just cited, if the attorney for the plaintiff can establish by evidence that the defendant was notified of his interest, then it may be that in an action in equity against the defendant company he may recover the agreed share of the proceeds of the settlement from the company, but the decision of the Supreme Court is that such recovery can not be had in an action at law, and this is an action at law. The objection, therefore, of the attorney to the dismissal of this case must upon the facts appearing here be overruled.

F. S. Monnett, for plaintiff.

B. L. Bargar, for defendant.

ASSESSMENT FOR REPAIR OF STREET.

[Common Pleas Court of Franklin County.]

JOHN F. ANDRIX ET AL V. THE CITY OF COLUMBUS ET AL.

Decided, April 18, 1905.

Street—Specifications for Repair of—Not Necessary Where Work is Done by the City—May be Repaired in Sections—Burden on Property Owner—To Show that Assessment Materially Exceeds Benefits.

1. The filing of the specifications for the repair of a street may be dispensed with, where the work is performed by the municipality directly and not by contract.
2. A street may be repaired in sections or parts, and the property owners assessed to pay the cost thereof.
3. Where an abutting owner seeks to enjoin the collection of an assessment for a street improvement on the ground that the assessment exceeds the benefits, the burden is upon him to show that such is the fact, and this burden is not overcome by merely showing that the market value of the property was not enhanced by the improvement.

RATHMELL, J.

This action is brought by the plaintiff and some forty others, to enjoin the collection of assessments against their properties for the repair of Broad street between Scioto river and Sandusky streets. The assessment was thirty-eight and seventy-three one-hundredths cents per front foot. The grounds alleged and relied on are:

First. That the assessment exceeds the special benefits resulting to the property from the repairs done.

Second. That the whole street to Central avenue was not assessed.

Third. That the provisions of the Pugh Law were not followed in making the repairs.

Two other questions are in the pleadings but not discussed:

One, the unconstitutionality of the law—being removed by the ruling of the Supreme Court in *Shoemaker v. Cincinnati*.

The other, that the assessment is greatly in excess of the cost of the improvement, it being conceded that the evidence adduced did not sustain the same.

1906.]

Andrix et al v. City of Columbus et al.

Taking these questions in reverse order, it is claimed that the plans and specifications were not prepared for the work to be done, in accordance with the law.

Section 5 of the act (93 Ohio Laws, 489) provides that if the board of public works should be of the opinion that the streets can be repaired cheaply or more advantageously to such city by its officers than by contract, it may so declare by resolution; and the council may pass an ordinance authorizing the officers to purchase or rent the necessary appliances and to employ the labor to repair the streets.

The record shows that the board, through its officers, made an inspection of the streets, made estimates of the necessary repairs and reported the same to the board; that it thereupon made a resolution of its opinion, recommended same to council, which passed an ordinance authorizing the board to make the necessary purchase or rent the machinery and employ the labor to repair the street; that a resolution of the board on the report of the commissioners for Broad street from Scioto river to Sandusky street, according to plans, was adopted.

Section 4 of the act providing for specifications seems designed more particularly to inform bidders on contract. Where the board is of the opinion that it can do the work cheaper than by contract the necessity for specifications for the performance of the work is practically dispensed with.

Furthermore my attention is called to another branch of this court, in the case of *Lanman v. The City*, having the same question, which sustained the assessment though no plans or specifications were on file with reference to the same. That ruling is followed on that ground.

Again, it is urged that since the street was originally improved from Scioto river to Central avenue, it can not be repaired in sections or parts. It is claimed by counsel for the city that a number of assessments have been upheld where only a section of the street was repaired, but it is not clear that the question was directly made as in this case. It is true that in some of the former cleaning and repair laws the language "or any part thereof," is used in connection with the words streets, avenues and alleys. In the law under consideration this phrase

does not occur. The language is that cities of the first grade of the second class shall have the power and authority to clean, sweep, sprinkle, and so forth, and repair any street, and so forth, as hereinafter provided. When any of the streets are repaired council shall pass an ordinance levying an assessment for such cost and expense as hereinbefore provided; the entire cost and expense of repairing any street shall be assessed equally by the foot upon all the lots and lands fronting and abutting upon such street, between the points named in the contract.

In Section 3 it is provided: "Said board may determine what is necessary to be done on any such street." A statute containing the same language was under consideration in the case of *Northern Indiana Railroad Company v. Connelly*, 10th Ohio State, 160 to 164. It was insisted there that the exception of the statute involved required the assessments to be made upon all and not merely a part of the property abutting upon the street.

The language was, "The council shall have power to defray the expense of grading, paving or improving any street," and so forth. The court thought the construction entirely inadmissible.

The council have power under the general words "any street" in the first clause of the section, to improve a part of a street, as appears to be conceded. It seems clear that the words in the next clause "grounds abounding and abutting on such street, confine the assessment to ground on the part of the street improvement." By comparative reasoning here under the language any street and part of the street might be repaired, and, by part of the clause, between all points named in the contract, the assessment laid upon the lots and lands fronting and abutting upon said street between all points named in the contract or the section repaired. (See also 1st Ohio State, 133; *Creighton v. Scott*, 14th Ohio State, 440, 441, where similar language is construed in a repairing act).

The statute authorizes the board to determine what is necessary to be done upon any street; if they can not repair a part of a street, then they would not be limited even to the original improvement, if it did not embrace the whole street.

1906.]

Andrix et al v. City of Columbus et al.

Upon the question of special benefits the plaintiff assumes the burden of establishing that the assessment was greatly in excess of any and all benefit to their lots and lands. The defendants after certain admissions deny generally the allegations of the petition not admitted.

Mr. Meek, for the plaintiffs, testifies the property not worth any more after the assessment, did not increase the activity of the sale of property; it don't change the price of property, not so much as a new street; of course, the repair keeps the street in better condition; the repairs might be a benefit to some extent; could not tell the exact amount; it might be a little benefit, marked value not increased any.

Mr. Gould did not think any difference in the value of the property; it benefits those who have the use of the street.

Mr. Henry, repairs don't benefit the property. Mr. Andrix could not have gotten any more for the property after improvement. There is a benefit but more for the public than to the owner; repairs do not benefit.

As suggested by the witnesses, it is difficult to estimate exactly the special benefit of a sprinkling, cleaning or repairing assessment. Most of the cases have been with reference to new improvements. If benefits are to be estimated in the market value, it is difficult to understand how any sprinkling or cleaning or moderate repair assessment could be maintained.

Spear, Judge, in *Walsh v. Sims, Treasurer*, 65th Ohio State, 217, suggests "Where the property itself is improved it is the value for use that is enhanced." He says, "A street improvement implies special benefit to the abutting property after the improvement is made. It is supposed to enhance its market value, and, where the property itself is improved, as a rule, enhances its value for use." Where the property, he said, is improved, as a rule it enhances its value for use, "which would seem that the right to repair at the expense of abutting property, which is resorted to in some municipalities, can rest on no sufficient basis other than the enhanced value of the use by the owner during the life of the proposed new pavement. Experience shows that all other elements of increased value have been exhausted by the first pavement." Here is mention of an

enhanced value of the use by the owner which is special and distinct from the market value. Does the testimony of the plaintiffs to the effect that the improvement did not increase the market value dispose of their burden of no special benefit as against an implied special benefit from an improvement. Two other witnesses admitted there was some benefit. I don't think so.

The evidence showed that the price for materials and labor were current and reasonable, that more than one hundred and fifty patches were made covering over twenty-five hundred square yards. It is claimed the street was not badly in need of repair.

The testimony showing that there was some benefit, the court holds that the excess, if any, of the cost, over the special benefit, is not of material character. In *Norwood v. Baker*, the court say: "Unless such excess of cost over benefit be of a material character it ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

The finding is for the defendants; injunction denied; petition dismissed at plaintiff's costs.

DeWitt C. Jones, for plaintiff.

J. M. Butler, for defendant.

1935.]

In re South Charleston Beal Law Election.

CONTEST OF A BEAL LAW ELECTION.

[Probate Court of Clark County.]

IN RE SOUTH CHARLESTON ELECTION CONTEST.

Decided April 26, 1905.

Liquor Laws—Beal Law Election—Contest of—Number of Signers to Petition—Evidence Must be Restricted to Irregularities Alleged—Mayor's Proclamation—Form of Ballot—Marking of the Ballot—Assistance Which May be Rendered the Voter—Irregularity of Election Officers, Not of Voters—Distinction Between Vote and Ballot—Ballots Cast by Idiots or Insane Persons—Rule for Counting the Votes—Elections.

1. A petition for an election under the Beal Law is sufficient as to the number of signers, when it has been signed by as many qualified electors as equal forty per cent. of those who cast their votes at the last preceding election.
2. The general allegation in a petition to contest the validity of an election under the Beal Law that the election was illegal, is not sufficient for the admission of testimony as to irregularities other than those specified in the petition, and it is not competent for the contestors to amend their petition at a date later than twenty days after the election.
3. An irregularity in the publication of the proclamation by the mayor will not be considered, where it appears that notice to voters of the pendency of the election was so general that more votes were cast than at the last preceding election.
4. Under the general rule that a mere irregularity in form, which does not mislead the electors, will not invalidate an election, the court holds that the form of ballot used in this case, although not the form laid down in the statute, is not a sufficient reason for invalidating the election, and especially in view of the fact that the contestors by participating in the election sanctioned the form of ballot used.
5. It is competent for judges of election, upon being informed that a qualified voter, who is unable to leave his carriage, has been driven up to the curbstone, to go out to the carriage and receive his ballot and deposit it in the ballot box; and were such not the case the irregularity is one which should be charged to the election officers rather than to the voter, and is not of a character which would interfere with a free expression of the peoples' choice.

6. The casting of a ballot which is not properly marked is not the casting of a vote, and in determining the number of votes cast, only those should be counted upon which the expression of a choice is indicated.
7. One whose mental condition is such that a court would experience no hesitancy in committing him to an insane asylum or in appointing a guardian for him were proper application made, comes well within the class of persons who under the term "idiot" or "insane" are prohibited from voting by the Constitution.
8. Where an election turned upon the vote of an insane person, and there is no way of determining which way the one thus afflicted voted, a court will deduct one vote from the proposition receiving the greatest number of votes, and the result being thus made a tie, the court will declare that there was no majority either way and no election under the statute.

GEIGER, J.

An election was held on March 14, 1905, in the municipal corporation of South Charleston, Ohio, under the provisions of an act commonly known as the Beal Law, Vol. 95, page 87, Ohio Laws.

The result of the election was certified by the judges to be—

"For the sale of intoxicating liquors as a beverage, 166 votes; against the sale of intoxicating liquors as a beverage, 167 votes; three ballots not marked, and two ballots marked incorrectly."

On the 24th day of March, and within the time limited by the statute, a petition was filed in the probate court to contest the result of the election. The contestors claim that the election was illegal and invalid for the following reasons: That there were no ballots cast at said election which were printed as required by law; that illegal votes were cast at the election by persons not entitled to vote, which changed the result of the election; and that a ballot was illegally thrown out by the judges; that said election was not petitioned for by forty per cent. of the qualified electors at the last municipal election of said corporation.

Many questions have arisen in the course of the trial, and such as seem to the court to be important will be passed upon in the order in which they were presented.

1906.]

In re South Charleston Beal Law Election.

The first claim made by the contestors is that the petition filed with the city council does not show upon its face the required percentage of electors in said corporation, and that the action of said council in ordering the election was illegal and void, and that the election for that reason should be set aside.

The petition for the election, as filed, contained 136 names. A committee of council was appointed to investigate the petition, and reported that in their opinion there were the signatures of 128 qualified voters upon the petition, and that it required 124 signatures to call an election; such number being forty per cent. of the number of votes cast at the November election of 1904, to-wit, 309 votes. The council thereupon ordered the election, and a certificate of the result was entered by the clerk upon the minutes of council.

It is contended that, under the provisions of Section 4364-20e, Revised Statutes, in municipalities having wards the petition would be sufficient if signed by as many qualified voters as equal in number forty per cent. of the votes cast in said municipal corporation at the last preceding general election; and that, in all other municipalities not having wards (as is the case of South Charleston), the phraseology "forty per cent. of the qualified electors at the last preceding municipal election" requires the petition to contain forty per cent. of all who may have been electors, whether they voted or not, at the last preceding municipal election; and it is sought to introduce evidence to show that there were electors in South Charleston at the time of the November election of 1904 who did not vote, and that the total number of electors upon which the percentage is based would be the number voting, to-wit, 309, plus the number who were qualified to vote, but did not vote.

It is necessary, then, to determine the meaning of the phrase "forty per cent. of the qualified electors at the last preceding municipal election."

Section 4364-20a provides that whenever forty per cent. of the qualified electors in a municipal corporation shall petition for an election, a special election shall be ordered. Section 4364-20e endeavors to define what this forty per cent. should

be in the two classes of municipalities. It is evident that the Legislature in passing Section 4364-20e endeavored to lay down a rule that would enable those petitioning for an election to determine when they had a sufficient number upon their petition. If we adopt the construction that the phrase "forty per cent. of the qualified electors at the last preceding municipal election" means forty per cent. of the total number of those who were electors, whether or not they exercised their right of franchise, then the rule is but an imperfect one, as those desiring to petition for an election would have no means of determining whether or not they have secured the requisite number, without taking a census of the electors of the municipality; whereas, if we accept the construction that the phrase means forty per cent. of the qualified electors who voted or exercised their right of franchise at the last preceding municipal election, then we have a fixed and certain rule by which the petitioners may be guided.

It is urged that the Legislature would not have changed the phraseology in these two provisions without an intention to distinguish in the measures by which the forty per cent. would be determined; but it appears to this court that the two provisions, one for municipalities having wards, and one for municipalities not having wards, relate wholly to the number of votes cast at the different elections provided for by said section. In municipalities having wards the number on the petition must be forty per cent. of the number of votes cast at the last preceding *general* election: while in the case of municipalities not having wards it should be forty per cent. of the votes cast at the last preceding *municipal* election; the only difference between the two provisions being the election which should be used as a standard in determining the forty per cent. This position seems to be sustained in *Hines v. Hillsboro*, 3 N. P., page 17.

The contestors claim further that the term "forty per cent. of the qualified electors at the last preceding municipal election" requires that the petition be signed by forty per cent. of those individuals who appeared and cast their ballots at the said election; and that it is not sufficient to have forty per cent. of the

1905]

In re South Charleston Beal Law Election.

number; but the very individuals who voted at the last preceding municipal election should sign the petition to the extent of forty per cent. This position is not tenable. The intention of the Legislature was not to give to the voters who cast their ballots at the preceding election any advantage over those who, by reason of absence, sickness, or other cause, did not. The body of the electors, as it may have existed at the last preceding election, may have changed considerably at the time of the filing of the petition, by reason of death, or otherwise. The plain intention of the statute is that when the petition is signed by as many qualified electors as shall equal forty per cent. of those who cast their votes at the last preceding election, then the petition shall be sufficient.

The next question arises upon the offer of the contestors to prove that the publication of the mayor's proclamation was not for the time specified by the statutes. This at once brings us to the consideration of the question, whether or not the contestors can introduce testimony upon points not set out in the petition. The petition states that the election was illegal, and then enumerates certain grounds upon which it is illegal. Said grounds relate to the ballot cast, illegal votes, and the throwing out of a vote, and the ground that the election was not petitioned for by the requisite percentage of electors. Nothing is said in the petition about the proclamation of the mayor; no allegation is made that the election was illegal for that reason. It is claimed by contestors that the statement in the petition that the election was illegal should allow them to introduce any evidence which would tend to show such illegality, and that it opens the door wide to the introduction of testimony upon any point; and, therefore, that it is proper that they introduce testimony to show that the publication by the mayor was not for a sufficient time.

Section 4364-20e provides that the probate judge in the procedure of the hearing shall be guided by the law providing for contest of the election of a justice of the peace; thus making the statutes in reference to the contest of the election of a justice of the peace of governing force so far as they are applica-

ble. Referring to Sections 568-575, Section 572 provides that the contestor shall make known to the probate judge "the points on which the contestor means to contest such election," and that the judge shall communicate the same to the person whose election is contested. Section 575 provides that "no evidence shall be admitted but such as relates to the points stated in the notice."

In analogy Section 2997, *et seq.*, provides that notice of the contest of the election of a county officer must be given to the contestee, and shall state the grounds of the contest, and the names of two justices of the peace before whom depositions shall be taken. Section 3000, Revised Statutes, provides that the justice shall not receive testimony upon any point not named in the notice.

It is clear to the court that the general allegation in a petition that the election was illegal is not sufficient to admit testimony upon "points" other than such as may be specified in the petition. If this was not so, the contestor might come into court stating no specific "point" upon which he relies, and upon trial introduce testimony that might relate to any and all matters touching the election; and the contestee would have no hint of the "points" he would be required to meet (*Howard v. Shields*, 16 O. S., 184). Nor is it competent for the contestors to amend their petition after the expiration of the twenty days after the election, as the proceeding for the contesting of an election is a special one, and the statutes providing for a proceeding in the court of common pleas do not apply. See *In re Gorey*, 2 N. P.—N. S., pages 389-403.

There is another ground upon which the testimony upon the publication of the mayor's proclamation may well be excluded, and that is the publication as given for the purpose of apprising the electors of the pendency of the election, but that such publication is not necessary if the electors are otherwise apprised of such election. It appears that, in this case, at the last preceding election 309 votes were cast in this municipality, and that in the election now contested 338 votes were cast, it clearly appearing that the electors of the municipality were fully

1905.]

In re South Charleston Beal Law Election.

informed of the pendency of the election and participated in the same. (*Fite v. State of Ohio* [Wood County], 4 C. C.—N. S., page 81, where a large number of cases are cited). The Supreme Court in the case of *Foster v. Schraff*, 15 O. S., page 532 (on page 537), say:

“We have no doubt that where an election is held in other respects as prescribed by law, and *notice in fact* is brought home to the great body of voters, though derived through means other than the proclamation which the law prescribes, such election would be valid.”

The court must hold that the testimony as to the irregularity of the mayor's proclamation is properly excluded.

The next objection to the legality of the election is that the ballot used was not of the form prescribed by statutes for elections under the Beal Law, but was of the form prescribed for local option elections in townships. Under Section 4364-20b, Vol. 95, page 89 O. L., the form is provided for ballots under the Beal Law: “The ballots at any special election held under the provisions of this act shall be printed with an affirmative and negative statement, to-wit, ‘The sale of intoxicating liquors as a beverage shall be prohibited;’ ‘the sale of intoxicating liquors as a beverage shall not be prohibited’, with a blank space on the left side of each statement in which to give each elector an opportunity to clearly designate his choice by a cross-mark”.

Section 4364-25, providing for local option elections in townships, reads “persons voting at an election held under the provisions of this act, who are opposed to the sale of intoxicating liquors as a beverage, shall have written or printed on their ballots ‘Against the sale’, and those who favor the sale of such liquors shall have written or printed on their ballots ‘For the sale.’ ”

The tickets actually voted at this election contained in large type at the head of each ticket “Special Local Option Election, South Charleston, Ohio”, and underneath a box having at the top “For the sale” and at the bottom “Against the sale”, with a blank space at the left side of each statement. It is claimed by the contestors that the provision as to the form of ballot is

mandatory and that the ballots not having been printed with the statement designated in the Beal Law, but with the statement in the township local option law, were illegal, and that consequently the election is void.

It will be observed that the two forms, the one prescribed for the Beal Law election, and the one prescribed for the township election, preserve the same position on the ballot for the proposition submitted to the electors, unless it might be construed that in the elections in townships an Australian form need not be used. On the ticket as printed, those in favor of the sale of intoxicating liquors voted the proposition first upon the ballot, which reversed the position prescribed by the Beal Law, as well as using the proposition provided by the township law instead of the Beal Law.

It appears that the ballots were never opened or exhibited from the time they left the printer's hands in sealed packages, until they were opened on the morning of the election, when the mistake was discovered, when considerable discussion took place concerning the different forms, but the election was finally proceeded with. By reference to the poll book it will be seen that the first vote was John Way, one of the contestors of this election, and that J. B. Malone, the other contestor, voted the seventeenth ballot. It fairly appears from the testimony that both these contestors were present at the time the ballots were opened and heard the discussion in relation to the form of ballot.

Am. & Eng. Ency. of Law Vol. 10, page 714, states the proposition, "The rule of law is well settled that objection to the form and contents of official ballots must be made before the election, and that when a person fails at the proper time to take any steps to correct errors in such ballots, he can not after being defeated, be heard to complain if there is an error in the ballots of which he had knowledge, and he might have corrected prior to such election," and a large number of cases are cited sustaining this proposition. The above citations refer particularly to the form of the ballot where different candidates are being voted for,

1905.]

In re South Charleston Beal Law Election.

but the same rule would certainly apply where the ballot voted is upon any given proposition.

Vol. 10, Am. & Eng. Ency. Law, page 725, states the rule in reference to form of ballots upon any given proposition, as follows—

“Where there is no ambiguity, the fact that the designation of the office is not technically accurate nor formal will not invalidate the ballot. When elections are held for other purposes than to choose officers the same principle prevails that neither a lack of absolute precision nor the use of surplusage will vitiate the vote if the meaning can be ascertained.” See cases cited.

In the case at bar the form of ballot must be construed to be sufficient to express the two propositions, as it contains the statement prescribed by statutes in the holding of an election for local option in townships, and being sufficient to inform the voter properly in a township election, it certainly is sufficient to give him the necessary information when he is voting within the limits of a municipal corporation; so that, the objection that the voters were deceived by the form of ballot has not great weight, as they are supposed to be intelligent enough to read the ballot.

Under the general rulings of courts that mere irregularity in form, where it does not mislead the elector, will not invalidate an election, the court must hold that the form of ballot used in this case, although it is not the form laid down in the statutes, is not a sufficient reason to invalidate this election; and further, that the two contestors in this case, having participated in this election and having hereby sanctioned the form of ballot used, can not now be heard to complain. It may be claimed that the contestors had no alternative but to use the form of ballot furnished, as it was too late to correct the same, but by the provision of the Hypes Election Law, Vol. 97, page 230, O. L., it is provided that if there is no official ballot provided, “unofficial ballots may be used, so that no elector, for lack of a ballot, shall be deprived of his franchise.” Under that provision of law, should no official ballots have been furnished, unofficial ballots

might have been printed in a very short time and used at the election.

The next irregularity claimed by the contestors relates to the vote of Charles Warrington, a blind man, and Laybourn Haughey, a man ninety-four years of age. These two ballots will be considered together. The evidence shows that in each case the elector was driven in a carriage to the curbstone in front of the building where the election was being held, the ballot box being at a point about 50 feet from the curbstone, in a room not directly facing upon the street, but connected with the street by a hall-way. In the case of each of these voters information was sent to the election officers that he was present at the curbstone in a carriage, ready to cast his ballot, and thereupon two of the judges of election took with them a ballot and went to the carriage and secured the vote of the elector, and, in each case, the ballot was then taken by the judges and deposited in the ballot box. No claim is made by the contestors that the voters were influenced, or the ballot in any manner altered before being deposited in the ballot box. It is insisted by the contestors that the Australian Ballot Law provides a method of casting the vote, which must be strictly followed, and that it requires the elector to proceed into the enclosed space, and after having received the ballot from the judges, to retire into the booth provided, and there in secret mark his ballot; and these two ballots not having been cast in accordance with such provision of the statutes, are illegal and should be thrown out.

The Constitution of Ohio, Article V, Section 1, provides that—

“Every white male citizen of the United States, of the age of 21 years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and shall be entitled to vote at all elections.”

To promote the secrecy and purity of the ballot the Legislature enacted the law known as the Australian Ballot Law. Section 2966-37 has the following provisions—

1905.]

In re South Charleston Beal Law Election.

“An elector who declares to the presiding judge of election that he is unable to mark his ballot by reason of blindness, paralysis, extreme old age, or other physical infirmity, and such physical infirmity is apparent to the judges to be sufficient to incapacitate the voter from marking his ballot properly, may, upon request, receive assistance in the marking thereof of two of the judges of election, belonging to the different political parties, and they shall thereafter give no information in regard to the matter.”

We may well inquire whether a law which would provide methods of voting by which the aged, blind, infirm, or paralytic would be excluded from an election, would not be in conflict with the provision of the Constitution above cited. It is claimed that the object of the Australian Ballot Law is to preserve the secrecy of the voter, and that when this is violated by the election judges going to the curbstone and receiving in the presence and possible hearing of bystanders the ballot, that such a ballot must necessarily be in conflict with the provisions of the law and void.

The judges are allowed by the statutes to assist the blind and infirm, the paralytic, and those suffering from physical infirmities which are apparent. It may well happen that the physical infirmity is such as would prevent the voter from leaving the carriage or reaching the actual presence of the ballot box, and the paralytic may be suffering from paralysis of the legs as well as the arms. The law constitutes the election officers the arm, or the legs, or the eyes of the afflicted person, as the case may be. There is no reason why a person paralyzed in the arms should receive assistance, while those having no use of the legs should have no assistance.

It clearly appears to the court that the term used in the statute, “Mark the ballot properly” means not only marking so far as the same is done with a lead pencil, but permits the requisite aid incident to such assistance as the voter requires in casting his ballot, within reasonable limits. It is highly proper that restrictions be placed upon the method of casting a ballot, but it is equally proper that certain latitude be given in case of necessity. The end of the Australian Ballot Law

is not the secrecy of the vote, but the purity of the election, and if the secrecy must, for any reason, be lifted, if it does not result in fraud, the vote should not be declared invalid. See 10 Am. & Eng. Ency. Law, page 703, and cases cited.

If the constitutional provision that persons having the required qualifications shall be entitled to vote, and the statutory provision as to the assistance of afflicted voters are not broad enough to allow this method of voting, then we must examine and determine, if possible, whether or not the casting of a vote in this manner is such an irregularity on the part of the election officers as would invalidate the ballot. The judges are properly assumed to be familiar with the law, and the voter casting his ballot in pursuance of their instructions, either expressed or implied, where there is no fraud claimed, should not thereby be deprived of his vote, unless such irregularity is of sufficient importance to effect the honest expression of the people.

The general rule as to the irregularities is laid down in 10 Am. & Eng. Ency., page 766, as follows:

"The general principles to be drawn from the authorities are that honest mistakes, or mere omission on the part of election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not avoid an election, unless they affect the result, or at least render it uncertain. But if the irregularities are so great that the election is not conducted in accordance with law, either in form or substance, and render the result uncertain, or where they are fraudulent and the result is rendered uncertain thereby, the election should be set aside." See cases cited on page 767.

In *Fike v. State of Ohio*, *supra*, election laws are held to be construed liberally, so as to preserve the will of the people, if possible, and not to defeat their choice as expressed by an election.

The court must therefore hold that these votes received at the curbstone were not illegal, first, because they were taken substantially as provided by Section 2966-37; and, second, if the provisions of that section are not broad enough to allow them to be so taken, the irregularity was that of the election officers, and not of the voter, and was not of such a nature as

1905.]

In re South Charleston Beal Law Election.

to render the election uncertain, or as to interfere with a full and free expression of the people's choice.

The number of votes certified for the sale of intoxicating liquors was 166, the number against the sale of intoxicating liquors was 167, and the number of ballots returned by the election officers as illegally cast was five, making a total of 338. It is claimed that 167 votes having been cast against the sale, that such number is not a majority of the total number of votes cast, to-wit, 338, and therefore that the election was not as certified on the minutes of council.

Section 4364-20e provides that "a majority of the votes cast" at such election shall be in favor of prohibiting the sale of intoxicating liquors as a beverage, etc. The question presented is, therefore, whether the ballots returned as illegally cast are to be counted as cast, for the purpose of determining what is a majority. The contestants claim that all ballots that went into the box should be counted as having been cast. The five ballots were returned by the election officers under the provision of the law requiring the returning to the deputy state supervisors of ballots concerning the legality of which there is any doubt or difference of opinion. These five ballots, upon examination, are clearly illegal, there being no mark on any of them, by which the intent of the voter might be determined.

The provisions of the Beal Law are that, if a majority of the "votes" cast shall be in favor, * * * etc. And under the provisions of the Hypes Law, the expression "ballots cast" is used, there being a distinction between a vote and a ballot. A vote is an expression of a choice (*State v. Green*, 27 O. S., 230). A ballot is a printed or written slip of paper upon which a choice may, or may not, be expressed. The casting of these ballots not properly marked was not the casting of a vote, and consequently the number of votes cast is not the total number of ballots in the box, but the total number of ballots on which the expression of a choice is indicated, and the total number of votes cast was 333, and not 338. See *Dexter v. Raine, Auditor, et al*, 18 Weekly Law Bulletin, 61; affirmed by the Supreme Court, 18 Weekly Law Bulletin, 301.

The next question to be considered is that in relation to one Leroy Pitzer, who is alleged by the contestors to be an idiot or insane person within the meaning of the Constitution of the state of Ohio. Section 6, Article V, of the Constitution of 1851 provides that no idiot or insane person shall be entitled to the privileges of an elector. It is claimed by the contestees that the mental condition of Leroy Pitzer does not bring him within either class, that of idiots, or that of insane persons. A great many authorities have been cited as to the correct definition of "idiot", and "imbecile," and "feeble-minded", and "insane". Medical definitions and legal definitions on this subject seem not to be in exact accord. Church and Peterson, medical writers on nervous and mental diseases, on page 767 define idiocy as "mental feebleness due to disease or defect of brain, congenital or acquired during its development." They hold that the term idiocy is generic, including all degrees of mental impairment in early life, idiocy being the lowest degree of mental disability; imbecility a higher degree, and feeble-mindedness is defined as a degree of idiocy in which the psychic faculties have their highest development.

15 Am. & Eng. Ency. Law, page 924, defines an idiot as one who has had no understanding from his nativity. Bouvier, on page 678 defines idiocy to be a *form of insanity* resulting either from congenital defect, or some other obstacle to the development of the faculties in infancy; and an idiot to be a person who has been without understanding from his nativity. He defines imbecility, on page 682, to be a *form of insanity* consisting in mental deficiency either congenital or resulting from obstacles superventing in infancy. It will be observed that he defines both idiocy and imbecility to be a *form of insanity*, and his distinction between the two is not clear.

Considering the uncertainty of a proper definition of the word "idiot", we may properly, for the time pass from its further discussion, to that of the other term used in the Constitution as a disqualification for an elector. An "insane person" as well as an "idiot" is prohibited from voting. 16 Am. & Eng. Ency. Law, (2d Ed.), page 562, defines the word "insane" as a general

1936.]

In re South Charleston Beal Law Election.

term, not confined in its application to persons who are wholly without understanding. Idiocy, lunacy, imbecility and feeble-mindedness are all treated in the encyclopedia under the general head of insanity. 1 Bouvier's Law Dic. (1877), 716, defines insanity to be "the prolonged departure without any adequate cause, from the state of feeling and modes of thinking usual to the individual in health." Church and Peterson define insanity as a "manifestation in language or conduct of disease or defect of the brain." Various statutes in Ohio define insanity for the purpose of the chapters in which they occur. (Revised Statutes, 720, 853, 3027, 5636-907, 5240, 671 and 6302).

It is claimed by the contestees that the term "idiot" and "insane person", as they appear in the Constitution of 1851, must be interpreted as to their meaning, by the scope given these terms at that time. In the case of *Clark v. State*, 12 Ohio, pp. 483-8, decided in 1846, a number of definitions occur and an interesting discussion of the question of insanity. The court says on page 488—

"It exists in all imaginable varieties and in such manner as to render futile any attempt to give a classification of its numerous grades and degrees that would be of much service, or under any circumstances safe to be relied upon; and much assistance can not be derived from metaphysical speculation."

On page 489, the court says, "insanity is a disease of the mind." The case of *Farrar v. State*, 2 O. S., page 54, decided in 1854, two years after the adoption of the Constitution, contains a very long discussion of insanity. The judge, on page 68, says, "I can not imagine her as other than idiotic or imbecile"; and on page 69, "It is enough to say that I think it proves her weak-minded and imbecile." The whole discussion shows that, to the mind of the judge, the term "insane person" would include an idiot, an imbecile, or a weak-minded person. The charge of the trial court, in which he says that insanity in its general legal sense is the inability to distinguish between right and wrong, is approved.

In the case of *Loeffner v. State*, 10 O. S., page 598, *et seq.*, on page 604 the trial judge charged "insanity, indeed, exists

in so many shapes and forms, and has so many varied insignia and manifestations, that it is almost impossible for science to comprehend it or give it intelligent definition. * * * The classes, species, and modifications are not well understood by any of us, learned or otherwise. It seems, indeed, as indefinite in extent as mind itself." This charge was sustained by the Supreme Court.

In the case of *Macconnehey v. State*, 5 O. S., 77, decided in 1855, the court says "delirium tremens, although the result or consequence of continued drunkenness, is insanity, or a diseased state of the mind, and affects responsibility for crime in the same way as insanity produced by any other cause."

In the case of *State v. Crew*, 10 W. L. J., 501, decided in 1853 by Justice Nash, it was held that the term *insane* in the act against having carnal knowledge of an insane woman, means a person of unsound mind, and includes an idiot. The discussion in this case is valuable. See also *Loers Heirs v. Truman* (1852), 10 W. L. J., 250; *In re Tempest*, 21 Bull., 301; 22 O. S., 271; *Ross v. Todd*, 4 C. C., p. 1.

The only case in Ohio that comes to the attention of the court in which the term "idiocy" or "insanity" is in any way referred to in the matter of election contests, is found in *Sinks v. Reese*, 19 O. S., page 306. On page 320 the court holds that one vote should be thrown out because the person was shown to be an idiot; and further holds that the vote of an old man, whose mind was greatly enfeebled by age, was not properly thrown out. Unfortunately this case does not disclose the evidence upon which the court determined what constituted an idiot, but it does seem to go far enough to show that a person whose mind is greatly enfeebled by age is neither a lunatic nor an idiot, within the meaning of the Constitution.

The question is, then, whether the mental condition of Leroy Pitzer comes within the definition or description of insanity laid down in the books. It can not be disputed that he is a person of diseased mind, of limited mental capacity, incapable of carrying on in an intelligent manner the ordinary affairs of life, having no distinct ideas upon the question of morality,

1905.]

In re South Charleston Beal Law Election.

right or wrong, and one who would probably not be responsible for any criminal act committed by him. His knowledge is so circumscribed and limited as not to include the most ordinary affairs, having no adequate knowledge of the value of money, or any definite conception of size or direction. The court would not hesitate a moment in adjudging him a proper person to be confined in an insane asylum were the matter brought before the court on an affidavit in lunacy; neither would there be any hesitation in appointing a guardian for him were a proper application made for the purpose, his mental condition being much more defective than in the majority of the cases where the court has been called upon to act in such matters.

He had the ordinary intellect of a child as he grew, until he reached the age of seven years, when he was stricken by a sunstroke, the immediate result of which was paralysis, with all conditions attendant upon complete imbecility. All who have testified concerning him admit that he is weak-minded, and several of the physicians testified that had his condition, as it now exists, extended continuously back to the time of his birth, he would be regarded as an idiot. Others say he is an imbecile. He displayed in his examination considerable shrewdness in some of his answers; but showed an absolute lack of knowledge of the proper way to mark his ballot, although he persisted in the statement that he voted "dry" at the election.

This election resulted in 166 votes being returned in favor of the sale of intoxicating liquors, and 167 votes being returned against the sale. The court can not convince himself that with 166 intelligent men voting on the one side, and 166 intelligent men voting on the other side, the deciding vote should be cast by a man of such limited intelligence as Leroy Pitzer; it clearly appearing to the court that he comes well within the class of persons prohibited by the Constitution from voting, under the term "idiot" or "insane person", as such terms are defined by medical and legal writers and decisions of Ohio courts, contemporaneous with the adoption of the Constitution of 1851. It is maintained by the contestee that, if he has not intelligence enough to cast a vote, and comes within the class inhibited by

the Constitution, that his testimony indicated that he cast one of the five ballots that were not counted, and that in this contest his ballot has decided nothing and has been thrown out. The evidence upon this point is simply that of Leroy Pitzer and should be given but slight consideration. It is sufficient to say that it is impossible to determine from his testimony how he voted, or whether he cast one of the five ballots not counted.

It must next be determined by what rule the ballot should be disposed of. By the provisions of Beal Law we are referred to the statutes controlling the election of justices of the peace, and Section 576 provides that no election of a justice of the peace shall be set aside by the freeholders merely because illegal votes have been given at such election, if it appear that the person whose election has been contested has the greatest number of legal votes given at such election, after deducting all illegal votes given when there is no evidence for whom such illegal votes were given, as well as all illegal votes which are shown to have been given for the person whose election is contested.

The court being unable to determine from the evidence how the ballot of Leroy Pitzer was cast, under Section 576, above quoted, it must be deducted from the proposition being contested, which leaves the result 166 in favor of, and 166 against the sale of intoxicating liquors.

The question then arises as to the proper entry for the court to make. It is claimed by the contestors, in spite of the prayer of their petition, that it now becomes the duty of the court to find that the election held resulted in a tie vote, and that therefore the prohibition of the sale of intoxicating liquors was defeated, the provision of the law being that if a *majority* of the votes cast shall be in favor of the prohibition of the sale * *

* , etc., it being claimed that unless the proposition to prohibit the sale receives a majority of the votes case it is lost, and the election shall be declared as resulting adversely to such proposition. On the other hand it is claimed by the contestees that the vote being a tie vote there is no *election*, for the reason that there is no *selection*. The importance of this contest is apparent

1905.]

In re South Charleston Beal Law Election.

when it is remembered that if there has been an election on March 14th, no other election can be held within the period of two years from that date; whereas, if the election is to be set aside another election may be held at once.

The court is free to say, that, had the result as certified by the judges of elections shown a tie vote, there might have been force in the argument of the contestors that there was an election at which the proposition to prohibit the sale was defeated; but the tie vote now appearing is the result of a *judicial determination*, and arises from the contest instituted and conducted under the provisions of the statute, and the final entry must be governed by the law relating to contests of election, to-wit, Sections 575 and 576, Revised Statutes.

Section 576 provides that no election shall be set aside merely because illegal votes have been cast, if it appears that the person whose election is contested has the *greatest number* of legal votes given at such election, after the deduction required; the inference clearly being, that where there are illegal votes given, the election must be set aside unless there still remains to the credit of the proposition being contested, the *greater number* of legal votes. The result in this case does not meet this condition, and the only logical conclusion is that the election must be set aside as entirely null and void. This conclusion is reinforced by the fact that, in a contest of election under Section 570, all illegal votes that are cast, where there is no evidence for whom such illegal votes were cast, must be deducted from the number given for the person whose election is being contested.

It might well have happened in this case that there could have been a large number of illegal votes without evidence for which proposition they were cast, and, under this statute, such unknown votes would arbitrarily be deducted from the proposition being contested, and thus leave the opposite proposition with the greatest number of votes, although the illegal votes deducted might in reality have been cast for the proposition thus arbitrarily made to prevail. It is a fact that this tie vote has resulted from the arbitrary rule of the statute which requires that the unknown illegal vote of Pitzer be deducted from the proposition

contested, and it would be manifestly unfair to make such a rule result in a victory for the proposition, which, but for the rule, would have been defeated. The conclusion is irresistible that the statute is intended to prevent the nullification of an election where, after deducting all illegal votes which are unknown and all illegal votes cast for the proposition being contested there still remains for such proposition a majority of legal votes. Of course any illegal votes which could have been shown to have been cast for the contestor, or the proposition presented by him, would properly be deducted from the number given to the contestor, or the proposition represented by him, although the statute does not expressly cover such a case. *State v. Wright*, 56 O. S., 540-550.

The entry will therefore be that the election is null and void and the same will be set aside.

Walter L. Weaver and *Charles E. Ballard*, for contestors.

F. M. Hagan, for contestee.

1905.]

Liebschutz v. Black et al, Trustees.

**CONTRACT OF LEASE DISSOLVED BY A SUPERIOR
AUTHORITY.**

[Superior Court of Cincinnati, Special Term.]

DAVID H. LIEBSCHUTZ V. L. C. BLACK ET AL, TRUSTEES.*

Decided, December 10, 1904.

Landlord and Tenant—Contract of Lease of an Unsafe Building—Subject to the Right of the Municipality to Deal Therewith—Order for Razing of a Leased Building—Not an Eviction by Title Paramount—Evidence that Building Can Be Made Safe Incompetent, When.

1. The doctrine of *caveat emptor* applies to one leasing a building that is unsafe, and the contract of lease is entered into subject to the superior right of the state to order the building razed in the event that it becomes a menace to the public.
2. The razing of a building by authority of a building inspector on account of its unsafe condition is not an eviction by title paramount, and in the absence of a covenant broad enough to survive such action creates no liability against the landlord.
3. In the absence of steps by either lessor or lessee to obtain a review, by the board provided for that purpose, of an order by a building inspector of a municipal corporation for the removal of a building on account of its dangerous condition, and his refusal to issue a permit for its repair, are equivalent to a specific order to tear the building down.
4. Evidence that it was practicable to have rendered the building safe by shoring it up and making certain repairs is incompetent, where fraud on the part of the officers ordering the building removed is not charged.

HOSEA, J.

Plaintiff is lessee, under an unexpired lease, of a storeroom twenty by forty feet, fronting on the west side of Race street above Sixth street at the corner of an alley. The premises are part of a large building fronting about fifty feet on Sixth street at the northwest corner of Race and Sixth, and extending northward ninety feet on Race to the alley. The entire building, although under one roof, is made up of several buildings, as

*Affirmed September 27, 1905, by the Superior Court, sitting in General Term; see end of opinion.

originally constructed at different times, with an average life of about fifty years.

The lease to plaintiff from the trustees of the Frank estate, was made on November —, 1903, for the "storeroom No. 607 Race street," for the "term of two years, three months and twenty days, ending February 28, 1906," at a monthly rental (in the usual form of lease, commonly called the "short form") and contains the following covenants:

"It is also agreed that if said lessees shall perform their obligations as they now are and to make all improvements and repairs, etc.

"It is also agreed that if said lessees shall perform their obligation under this lease they shall quietly have and enjoy said premises during said term free from molestation from said lessors."

There is a further clause releasing the lessee from rent in case the premises are destroyed or rendered untenable by fire or other casualty.

On July 6, 1904, the trustees were served with a notice by the building inspector of the city of Cincinnati, setting forth that as the building fronted fifty feet on Sixth street and extended back fifty feet, being quite old and, by reason of extensive changes and alterations made at various times, had become very materially impaired in stability so as to warrant the belief that its failure was imminent, and that its structure and condition made it a "death trap" and "unfit for occupancy, and a menace to life and property," they were required to have the building vacated without unnecessary delay, and all weak and defective portions reconstructed, etc., and, if found impracticable to repair, to proceed with immediate removal; in default of which the inspector would proceed as the law directs and assess all costs against the property.

On August 9, 1904, the building inspector served upon the trustees, defendants, a substantially similar notice as to the building adjacent to that mentioned, on the north, fronting forty feet on Race, including plaintiff's storeroom, stating that said building was unsafe and dangerous for reasons set forth, and that the condition of its walls would become hazardous "if dis-

1905.]

Liebschutz v. Black et al, Trustees.

turbed through fire or the demolition of the buildings adjoining to the south;" and that "the whole structure would become unsafe and liable to collapse, should the adjoining buildings, of which they are a part, be razed, and would also have to be taken down."

The testimony of the building inspector on the stand in this cast confirms in greater fullness and detail his views and observations of the unsafe condition of the entire building, and his attitude of refusal to permit any attempts to repair or reconstruction other than by first razing the entire structure—considering the whole as one structure.

Testimony of architects was introduced to show that it would be practicable, by shoring and other repairs, to make the north building reasonably safe; but it does not seem to me that any such testimony can be considered except where fraud on the part of the inspector is charged.

As early as "Mouse's case," 12 Co., 63, the right to pull down a house to prevent a spread of fire was sustained; and the same thing is held in a case in 4 Term, 797, wherein Buller bases this right on the ancient maxim, "*Salus populi est suprema lex.*"

In an early Massachusetts case, on the same subject, *Taylor v. Inhabitants of Portsmouth*, 49 Mass., 462, 465, the court says:

"If there be no necessity, then the individuals who do the act shall be responsible. This is the most reasonable, as the law has vested the authority in the proper officers to judge of that necessity."

The municipal code of this state, adopted in 1902 (96 O. L., 23, Section 7, Par. 13), confers upon cities general power, "to provide for the removal and repair of insecure buildings." This power had long been exercised theretofore under special laws of the state and ordinances of the city passed in pursuance of such laws.

The building inspector is appointed and his powers defined under ordinance 218, passed August 15, 1898, but amended—as to Section 6, which is here in question—June 9, 1902.

Speaking generally, he is authorized to examine buildings thought to be insecure and give orders for their repair, etc.,

and it is made a penal offense to fail to comply with his orders in the premises. He is also vested with authority to permit or refuse specific repairs.

In *Connors v. Mayor of New York*, 11 Hun., 439, it is held that:

"The powers conferred on this department (buildings, etc.) are in many respects judicial, and the machinery of the law is put summarily in motion where the department acting under the laws, calls for its application." (Citing *Maximilian v. Mayor of New York*, 62 N. Y., 160.)

In *Snarr v. Baldwin*, 11 Up. Can. Com. Pl., 353, there is a full discussion of the effect of the action of city authorities upon the contract relations of lessor and lessee. It is there held that the right of the city was not a title paramount in law, but a superior authority; that the act of the city was not brought about by any act of the lessor; that the covenant for quiet enjoyment is simply indemnity against acts of particular persons, that is, those having lawful title before the covenant was entered into; and that the rule that a contract may be dissolved by superior authority so as to absolve a contractor from performance, applies in such case.

The same principle is illustrated in a series of cases showing that when a performance of a condition of a contract becomes impossible by the operation and effect of a statute, and performance becomes thereby illegal, performance is excused. *Shellington v. Howland*, 53 N. Y., 371, 372.

In *Heine v. Meyer*, 61 N. Y., 171, it is held that when a contractor is stopped in the work of repairing a building by the building inspector, further performance is excused, but he may sue and recover for the work done, provided that the defect is not of his making. And to the same effect are: *Jones v. Judd*, 4 N. Y., 411 *Niblo v. Binsse*, 1 Keyee (N. Y.), 476.

In Ohio, the rule of "*caveat emptor*," is well established as applicable to the rights and obligations of the lessee.

In *Jones v. Roberts*, 32 Bull., 118, Judge Pugh of the Franklin common pleas, cites *Bowe v. Hunking*, 135 Mass., 380, 386, quoting the statement therefrom that, "the law is unusually strict in exempting the landlord from liability for injuries

1905.]

Liebschutz v. Black et al, Trustees.

arising from defects where there is no warranty and no actual deceit," and he himself deduces the rule that the tenant assumes all risks of the premises being inhabitable and unsafe, in the absence of a warranty in the contract.

In *Burdick v. Cheadle*, 26 Ohio St., 393, it is said, *passim* p. 397, "There is no implied engagement or promise, on the part of a lessor, that the leased premises are in a safe condition." See also: *Shinkle v. Birney*, 68 Ohio St., 328; *Burns v. Lockett*, 3 Bull., 517.

In *Steefel v. Rothschild*, 72 N. Y., Supp., 171, it is held that a tenant takes possession under his lease "subject to the risk of being dispossessed through the condemnation of the leased building as unsafe and dangerous." This principle has its exceptions very properly, where the lessor purposely renders the building unsafe and procures the destruction of the building through condemnation proceedings, as in *Silber v. Larkin*, 94 Wis., 9 (68 N. W. Rep., 406).

Steefel v. Rothschild, *supra*, was a suit in damages based upon deceit amounting to fraud in the lease contract, with reference to unsafe conditions, known to lessor but not to the lessee, nor discoverable by the latter in the exercise of ordinary diligence. It was first affirmed in 82 N. Y. Supp. and subsequently reversed on final hearing in 72 N. E. Rep., 112; holding the lessor liable as upon eviction under the rule that upon notice to take from jury, the evidence and all legitimate inferences therefrom are to be taken most strongly against the motion. The effect of the reversal therefor, simply establishes upon the facts of that case the usual exception in a case of fraud, and it may be said here as elsewhere that the exception proves the rule and the original statement stands as authority unaffected by the subsequent proceedings.

The principle as above stated, is very fully covered by the case of *Conner v. Bernheimer*, 6 Daly, 295, wherein it is held that the covenant of quiet enjoyment is necessarily entered into subject to the possibility of such a state of things (as illustrated in that case) occurring from the nature and condition of the premises devised, and the rights of adjoining owners. In the absence of a contract to repair or rebuild, the tenant takes the

premises as they are; and if, in consequence of natural decay or the taking down of a building by an adjoining owner, it becomes indispensable as public duty for the public safety, to take down the building to prevent its falling down, there is no violation of the covenant for quiet enjoyment, which is nothing more than—to use the language of Mr. Taylor—that the lessee shall not be evicted nor disturbed by persons deriving title from the lessor by virtue of a title paramount.

The taking down of a building as an act of necessity to prevent its falling down, either by the public authorities, or in obedience to their orders, is not an eviction or disturbance of the possession by title paramount, there being no question of title involved in such act. The taking down and destruction of a building under such circumstances, has no more effect upon covenants in a lease than the destruction by fire, which does not produce the effect of eviction, unless the landlord has expressly covenanted to rebuild or keep in repair. *Taylor, Landl. & Ten.*, Sections 305, 309.

The point is that the right of the state under its police powers to deal with the subject of insecure buildings, founded, as Justice Buller truly says (4 Term, 797, *supra*), upon the principle that the safety of the people is the supreme law, is superior to titles paramount derived through individual owners; and consequently the contracts of parties in relation to property uses are entered into in view of these existing and superior rights of the state and are subject to them.

In the case at bar, the question is not complicated by stipulations often found in the covenant for quiet enjoyment, as exist in some of the cases cited by plaintiff's counsel. The plaintiffs here took the premises "as they were" and stipulated to make "all improvements and repairs"; and they were guaranteed quiet possession only as against molestation from the lessors

The terms of the covenant were a material element, for example, in *Kansas Invest. Co. v. Carter*, 160 Mass., 421. The covenant in that case was against hindrance or interruption from "all persons whomsoever"; which covenant, says the court, "bound the lessors not to do any unnecessary thing," and, as

1995.]

Liebschutz v. Black et al, Trust es.

the requirements of the authorities was in the alternative, it became a question of proof; and, as the lower court had found as a fact that the building could be made safe without taking down, the right of election, it is said, was *limited by the nature of the covenant*.

It should also be borne in mind, that, in some of the states, statutes provide for a legal proceeding to determine the question whether repairs are practicable or removal is necessary. In such cases the action of the building inspector can not be final.

Our law—whether wisely or not, is not in question—places the power of dealing with insecure buildings in the municipality, which acts through its duly appointed officer. As already pointed out, his orders are enforceable by penal prosecution, and by his further power to dictate the method of procedure by refusing permits to repair, if in his opinion the building should be taken down. Unquestionably an abuse of these powers can be restrained by the courts; but in the proper exercise of his official functions he is supreme. As was said in *Cincinnati v. Moorman*, 25 Bull., 126, “the building act * * * being enacted for the protection of life, it must be given a liberal construction, such as will effectually accomplish its purpose.” *Sprigg v. Garrett Park*, 89 Md., 406 (43 Atl. Rep., 813, 815).

The rule plainly deducible from the cases cited, seems to me, on principle, to be this: That, with respect to the superior power of the state in relation to insecure buildings, the lessor and lessee stand on an equal footing. The law applies to both. The destruction by the order of the state, through its officers, is not an eviction, and creates no liability on the part of the landlord in the absence of a covenant broad enough to survive such action. It is possible the views herein expressed might derive some support from Revised Statutes, 4113, but it does not seem to me necessary to refer to it. *Winton v. Cornish*, 5 Ohio, 477.

In the present case, the covenant is specifically limited, and falls far short of sustaining a demand on the part of the lessee. The orders of the building inspector and his refusal to issue permits for repairs with a view to preservation, are tantamount to a specific order to tear down the buildings, and inasmuch as no steps were taken by either party to obtain a review of the

order by the board provided for by the ordinance, the order was final, and practically put an end to the lease contract.

I have carefully examined all the authorities cited by plaintiff at the hearing, and find in them no support for any other view as applied to the facts presented here. Judgment must be in favor of the defendants, and it is so ordered.

Suit dismissed with costs.

Samuel Wolfstein and Pogue & Pogue, for plaintiff in error.

L. C. Black, Stephens, Lincoln & Stephens and Kramer & Kramer, for defendants in error.

The decision in general term affirmed the judgment below, and is subjoined:

FERRIS, J.; HOFFHEIMER, J.; and CALDWELL, J., concur.

The plaintiff below is the plaintiff in error here, and as lessee under an unexpired lease of a storeroom, 20 by 40 feet, being a part of the premises situated at the northwest corner of Race and Sixth streets, in the city of Cincinnati, sought to obtain an injunction to restrain the defendants from tearing down the building of which the leased room was a part.

The tenancy was admitted, and there was no serious discussion with reference to the terms under which the plaintiff was holding, and no difference as to the conditions of the lease. The court below found that the owners of the legal title to the property had been served with notice by the official building inspector of the city of Cincinnati, of the dangerous condition of the property, declaring the same "unfit for occupancy and a menace to life and property" and ordering immediate repairs, and in the event of the impracticability of repairing, ordered the immediate removal of the structure.

The testimony of the building inspector and others satisfied the court below that the entire building was unsafe and irreparable, and under such conditions the court found under the authorities that the legal owners were in duty bound to respect the orders of the official building inspector of the municipality, whose duty was defined by ordinance of the city of Cincinnati, requiring not only the examination of the buildings, but the

1905.]

State, ex rel, v. Board of Education.

giving of orders for repair, and if necessary the razing of the buildings, on the grounds of public safety. Under such orders the defendants were acting when the injunction was sought.

The facts justifying the application of the doctrine calling for a dissolution of contract of lease when the necessity is declared by an authority recognized in the law as superior to that of the contracting parties, were properly found in this case by the court below. The authorities cited to support that contention in our judgment justified the position taken by the trial judge in refusing the injunction. We therefore affirm the finding on the authorities cited by the trial judge.

CUSTODY OF SINKING FUNDS OF SCHOOL DISTRICTS.

[Common Pleas Court of Hancock County.]

STATE OF OHIO, EX REL DONNELL ET AL, V. THE BOARD OF
EDUCATION OF THE CITY OF FINDLAY, OHIO, ET AL.

Decided, September, 1905.

Sinking Funds of School Districts—Custody of—As Between the Sinking Fund Trustees and the Board of Education—Orders on Such Funds—Must Be Drawn by Whom—Construction of Statutes.

1. The board of commissioners of the sinking fund of a school district appointed under Section 3970-1, Revised Statutes, is entitled to the management and control of said fund for the payment of debts and investment of the surplus without dictation, but is not entitled to the custody or possession thereof.
2. Under Sections 3970-4 and 4047, Revised Statutes, orders drawn on said fund must be drawn by the president and clerk of the board of education in favor of the person entitled thereto upon requisition made upon them by said board therefor.

DUNCAN, J.

This is a case in mandamus, brought on relation of James C. Donnell et al, as members of the board of commissioners of the sinking fund of the Findlay School District of the City of Findlay, Ohio, against the Board of Education of the City of Findlay, its president and its treasurer, to require them to turn over to relators as such board of sinking fund commissioners,

the money levied, collected and now in the sinking fund, amounting to the sum of \$9,100.65, for extinguishing of all the bonded indebtedness of said Findlay School District.

The relators say that they have no money now on hand, and that certain of the bonds of said school district are about to mature, as well as the interest on a bonded indebtedness of \$200,000, and that they will need all of said money for the purpose of paying said maturing interest and bonds, and that it will be necessary to have the management and control of said monies to the end that said interest and bonds may be paid and that the surplus, if any, may be invested as required by the statute in such case.

They say that in order to have the management and control of said fund as contemplated by the statute, and to enable them to discharge their duties as such board, it will be necessary to have said money transferred to them, but that respondents refuse to recognize their rights, duties and obligations, and have refused to so transfer said money, although they have made a written requisition upon respondents therefor.

A general demurrer is filed to this petition. This raises the question whether as a legal right the board of sinking fund commissioners appointed under the provisions of Section 3970-1, Revised Statutes (97 O. L., 352), are entitled to the possession of this money and at such time or times as they deem it necessary or convenient to properly perform their incumbent duties.

This involves a construction of Sections 3970-1, 3970-2, 3970-3 and 3970-4 of the Revised Statutes, as found in 97 O. L., 352.

Reading these sections in their order, it will be observed that the board of education is required to "provide a sinking fund for the extinguishment of all the bonded indebtedness," and to that end "set aside from its revenues a sum equal to not less than one-fortieth of said indebtedness, together with a sum sufficient to pay the annual interest thereon." The section also provides that said "sinking fund shall be *managed and controlled* by * * * the board of commissioners of the sinking fund."

The statute limits the purpose of such management and control to the extinguishment of said "bonded indebtedness" and to certain investment of surplus funds. The board of educa-

1905.]

State, ex rel, v. Board of Education.

tion has nothing to do with said fund; that is, nothing to do or say with its management and control. No option or discretion is vested in it and no supervisory authority or check is delegated to it. And this applies as well to its president, clerk and treasurer. Except for the provisions in Section four of the act, that "Orders on the sinking fund shall be drawn by the same authority, and in the same manner as orders for the payment of money from the school funds," I would hold that the board of commissioners of the sinking fund would have power and authority to draw their orders directly on said sinking fund, but such does not seem to be the system provided. The levy is made by the board of education and the fund is created by the board setting aside a certain portion of the collections made. The money in said fund then becomes available to the "management and control" of said board of commissioners of the sinking fund, but such "management and control" so delegated by said act is qualified by said provision which I quote again: "Orders on the sinking fund shall be drawn by the same authority and in the same manner as orders for the payment of money from the school funds." This leads us to inquire by what authority—and in what amounts—orders for the payment of money are drawn upon the school funds, and whatever that is, it is the test which must be applied in the solution of the question whether or not it is the duty of the board of education to transfer and pay over said fund to the board of commissioners of the sinking fund. Section 4047, Revised Statutes (97 O. L., 367), provides that "No treasurer of a school district shall pay out any school money except on an order signed by the president and countersigned by the clerk of the board of education."

It may be said without statutory provision therefor that the president and clerk have no right to draw their order upon the school funds until the money is needed by which the order is to be drawn. It is also provided by Section 4055, Revised Statutes, that both clerk and treasurer shall keep an accurate account, not only of the money on hand, but of the money in each fund and the purpose for which any is drawn out. This would seem to require that all orders issued for money should

state, not only out of what fund it should be drawn, but also the *purpose* for which, and the Bureau of Inspection and Supervision of Public Officers, under authority and direction of Section 181a-2, Revised Statutes (95 O. L., 512), has prescribed the form to be followed in all cases, including the several requirements mentioned.

It is also provided by said act, Section 3970-2, Revised Statutes, that "All interests received from said investments (made by said commission) shall be deposited in the treasury to the credit of said sinking fund, and re-invested in like manner."

In the light of these provisions of the statute and in the absence of some provision of statute for the transfer or turning over of the sinking fund to this commission, and in the absence of some statutory authority for them to provide a depository for themselves, or even to elect a treasurer, and in the face of specific statutory provision made by Section 3968, Revised Statutes (97 O. L., 351), allowing the board of education to provide a depository by public letting for "all moneys coming into the hands of the treasurer of the board." I think the conclusion is irresistible that this sinking fund must remain with the treasurer of the board of education until paid out upon the order of its president and clerk to the person entitled thereto upon requisition therefor made by said commission, stating the amount and purpose thereof in each case.

It may be said that this is not the way it is done by the city sinking fund commission, and this may be true, but the statute in that case is much different from the one here under consideration. Why it should be is not a judicial question. It is the duty of the courts in construing statutes to ascertain as near as possible from the statute in question and those having some relation to it, what is the legislative intent and to declare accordingly. This I have tried to do in this case.

It must therefore follow from what I have said that the demurrer should be sustained.

J. A. & E. V. Bope and John E. Priddy, for relators.

Reed Metzler, City Solicitor, for respondents.

1906.]

Herold v. Herold et al.

CONTROL OVER PLACE OF BURIAL.

[Common Pleas Court of Butler County.]

SARAH J. HEROLD v. HENRY HEROLD AND ALBERT P. WAGNER.

Decided, July 22, 1905.

Dead Bodies—Right of Burial and Paramount Right of Burial—Disposition of Body by Will—Wishes of the Deceased as to Place of Burial—Right of Widow to Determine Place.

1. There is no universal rule as to the burial of the dead applicable alike to all cases, but each must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association.
2. The paramount right of burial of a dead body is in the surviving husband or widow, and if the parties were living in the normal relations of marriage, it will require a very strong case to justify a court in interfering with the wish of the survivor.
3. A man can not by will dispose of his dead body, for there is no property in it, and it does not form a part of his estate.
4. The expressed wishes of the decedent should be considered by the court, together with all the other circumstances of the case, but such wishes are not absolutely controlling upon the court.
5. Where the evidence shows that husband and wife were upon good terms at the time of the death of the husband, and that the wife was discharging her full duty to him, her right to dictate the place of burial will be sustained by the court, even against the expressed wishes of the husband, especially where a child of the parties resides, with her surviving mother, at a place distant from that where the husband desired to be buried, and where there is not sufficient room upon the lot in the cemetery designated by the husband as his burial place to hereafter hold the bodies of the said widow and said child.

BELDEN, J. (orally).

This is an action to obtain custody of the dead body of one Ernest Herold. The plaintiff is the widow, and the defendant, Henry Herold, is the father, of said Ernest Herold. The defendant, Albert P. Wagner is the undertaker employed by the defendant, Henry Herold, to prepare the body of Ernest Herold for burial, and to inter the same.

The plaintiff desires to have the body interred in Lakeview Cemetery, in Cleveland, in this state. The father and sisters of deceased desire to have the body interred in Greenwood Cemetery, at Hamilton. The controversy is between these parties.

The authority of a court of equity to decide matters of this kind is unquestioned. 8 Am. & Eng. Ency., p. 836; 13 Cyc. 268.

The widow has the paramount right in case of dispute between her and the next of kin. 7 C. C. Rep., 196, *Hadsell v. Hadsell*.

The debatable question in this case, however, is as to whether the express wish of a decedent should control.

Ernest Herold, the day before his death, signed the following paper:

"In the name of the Benevolent Father of all, I, Ernest Herold, being of sound mind and memory, and believing myself in imminent danger of death, hereby direct and authorize my father, Henry Herold, to have absolute control and disposition of my body after my death. It is my wish to be buried in Greenwood Cemetery, Hamilton, Ohio, and I so direct.

"Signed by said Ernest Herold in our presence, and by us of two witnesses, and acknowledged by me to be my last will.

"ERNEST HEROLD.

"Signed by said Ernest Herold in our presence, and by us in his presence, and in the presence of each other, at his request, and acknowledged by him to be his last will, this 18th day of July, 1905.

"J. H. ZEILNER,

"THEODORE E. BOCK."

This indicates clearly what the wish of the decedent was.

In addition to that, the court has heard evidence. One of the sisters of Ernest Herold testified that several times before his death he said he wanted to be buried in Greenwood Cemetery at Hamilton, that his body might lie by the body of his mother, who died some six years ago.

As I have said, this is a debatable question.

That the wishes of the deceased should control, see 8 Am. & Eng. Ency., p. 836; 13 Cyc., 271. The text says it should control, even in opposition to the wishes of the family of the decedent.

1906.]

Herold v. Herold et al.

I find, however, that that is not supported by at least one of the decisions cited, the only one to which the court has had access—the case of *Weld v. Walker et al*, 130 Mass., p. 422. That does not sustain the contention of the author of the article published in the *Encyclopedia*.

The second syllabus of this case (*Weld v. Walker*) reads as follows:

“If a husband has not freely consented to the burial of his wife in a lot of land owned by another person, with the intention or understanding that it should be her final resting place, a court of equity may permit him, after such burial, to remove her body, coffin and tombstone, to his own land, and restrain that person from interfering with such removal.”

It will be noted that instead of holding that the wishes of the decedent should prevail, it says nothing upon that subject. The court has read the opinion, and finds nothing upon that subject. But it does say that the husband, even after the wife has been buried in one lot, may remove her remains to a lot owned by him.

The same thing may be said as to the authorities cited in 13 Cyc.

One of the authorities cited is the case of *Smiley v. Bartlett*, 6 Ohio C. C. Rep., 234. Scribner, J., deciding the case, says:

“While it is eminently right and proper that the expressed wishes of a deceased relative should be considered in determining the selection of the place of burial, as it is claimed is the case here, a wife has made known her wish to be buried by the side of her deceased husband; nevertheless this consideration is not to have absolutely controlling effect.”

Therefore, instead of being an authority to the effect that the wishes of the deceased must be regarded, it simply holds that it is one of the circumstances to be considered by the court, but that does not control the court.

There are other cases upon this subject, which the court has found after considerable investigation. There are a number of decisions in regard to the right of custody as to dead bodies

in the American State series. The court has examined a number of them, but will cite but two.

The first is the case of *Enos v. Snyder*, 82 American State Reports, p. 330 (131 Cal., 68; 63 Pac., 170). The syllabus is as follows:

“Wills.—Disposition of one's own dead body.—A man can not by will dispose of his dead body, for there is no property in it, and it does not form a part of his estate.

“Cemeteries.—Right of burial.—Who has.—The right of burial of a deceased wife or husband belongs to the surviving spouse, and in other cases to the next of kin, being present and having the ability to perform the service; and courts have the power to protect the exercise of such right.

“Cemeteries.—Right of Burial.—An executor or administrator is not entitled as such to bury the body of his decedent, and is not entitled to its possession for that purpose, as against those who do have a right to its custody for the purpose of burial.

“Cemeteries.—Right of Burial.—Relatives.—Claimants by Will.—If a man dies, his surviving wife and daughter have the right to the possession of his body, for the purpose of burying it, as against others who claim that right under the provisions of a will.”

It seems to me this case is directly in point.

There is a case cited by the Pennsylvania Supreme Court, *Pettigrew v. Pettigrew* (207 Pa. St., 313; 56 Atl., 878), 99 American State Reports, p. 795, which is a very interesting case upon this subject.

I read a portion of the syllabus:

“Dead Bodies.—Property in.—The law recognizes property in a human corpse, but such property is subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise.

“Dead Bodies.—Right of burial.—There is no universal rule as to the burial of the dead applicable alike in all cases, but each must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard, by reason of relationship or association.

“Dead Bodies.—The paramount right of burial of a dead body is in the surviving husband or widow, and if the parties

1905.]

Herold v. Herold et al.

were living in the normal relations of marriage, it will require a very strong case to justify a court in interfering with the wish of the survivor.

“Dead Bodies.—Right of Burial.—If there is no surviving husband or wife, the right of burial of a dead body is in the next of kin in the order of their relation to the decedent as children of proper age, parents, brothers and sisters, or more distant kin, modified as it may be by circumstances of special intimacy or association with the decedent.

“Dead Bodies.—Method and Right of Burial.—How far the desires of a decedent as to his method of burial should prevail against those of a surviving husband or wife, is an open question, but as against remoter kindred such wishes, especially if strongly and recently expressed, should usually prevail.

“Dead Bodies.—Right of Removal and Reinterment.—If a decedent, leaving a widow and one child surviving, is buried in a lot belonging to his father's family, with the widow's consent, at least to such temporary burial, and upon the subsequent death of such child it is buried in a lot owned by the widow in another cemetery, the widow has the right to remove the body of her husband to the lot purchased by her, in accord with the expressed wish of such child, especially when there is not room in the lot where the husband was buried for the burial of the widow and child, unless they were put in the same grave with the husband, and the hostile feeling of his family make it doubtful if this privilege would be granted.”

Now in the case at bar it appears that the Herold family own a lot in Greenwood Cemetery which will permit the burial of seven bodies. Only one body is interred in that lot at present—that of the mother of Ernest Herold. If the body of Ernest Herold is interred there, that would make two bodies interred there. There are four sisters, who would have the same right to be buried in that lot as Ernest Herold has—that would make six, leaving room for one more. But, as was said in the Pennsylvania case cited, where it is doubtful whether the family would consent to the burial of the widow and child there the court should give the wife the right to inter the body in another cemetery.

In this case, one of the witnesses, a member of the Herold family, stated that so far as she was concerned, Mrs. Sarah Herold, widow of Ernest Herold, can, upon her death, be

buried in the family lot. But the others were not here to speak for themselves. And, even if Mrs. Sarah Herold would have the right to be buried upon that lot there would be no place for her child to be interred in that lot.

It seems to the court that under all the circumstances of the case, that it is best that the widow, Sarah J. Herold, should be awarded the custody of the body of Ernest Herold.

The court has given some consideration to the question as to whether this paper, which I have read, is a will. That it is not a will which can be probated under the laws of Ohio, has been decided by the probate judge of this county, on yesterday I think the probate court was justified in making that decision—the only decision that could be made under the law.

Upon that subject I cite Jarman on Wills, Vol. 1, p. 27, note:

“An instrument which disposes of no property, but simply declares an intention to revoke a previous will, is not a will or codicil, and is therefore not entitled to probate.”

The first part of that is applicable to this case—“an instrument which disposes of no property” is not a will, and is not entitled to probate.

That a corpse is not property has been decided in the case in 7 Ohio C. C. Reports, which has been referred to heretofore by the court.

This is a peculiar case. The evidence shows that Ernest Herold has been, for sixteen or seventeen months at least, a temporary resident of the city of Hamilton, county of Butler; he came back to his boyhood home during his last illness. It does seem as though the wishes of the father and sisters who waited upon him during his last illness ought to have some consideration by the court. The testimony shows that one sister waited upon him by day, and another sister waited upon him by night. If the evidence in this case showed that there was any separation between the husband and wife, and that she was not discharging her full duty to this sick husband, I would, in spite of all that has been said heretofore, give the custody of the dead body of Ernest Herold to the sisters and the father. But no such case arises under the evidence. The evidence shows

1906.]

Herold v. Herold et al.

that the wife worked faithfully, in the city of Cleveland, as a dress maker, to earn enough money to support herself and her child, and that she not only did this—not only supported herself and child by labor of her own hands, but that she earned enough money to send to her sick husband various sums almost every week, or every two weeks. The evidence shows that letters were exchanged between the husband and wife. Also, that last March Ernest Herold had recovered sufficiently to go back to the city of Cleveland, or thought he was well enough to go, and did go; that he stayed there with his wife some ten days, and then concluded, according to the evidence, that it would be better for him to return to Hamilton. But it appears that there was no thought of a permanent separation at that time. On the contrary, at the request of Ernest Herold, his wife packed and stored her household goods, and packed her trunks, and expected and had arranged to go to Denver, Colorado, with her sick husband, when she was notified of his death.

The evidence shows that this widow is able to provide a proper burial for her husband, that she is willing to do it; she is willing to pay all expenses incurred.

The fact that this deceased person has a child, who is living in Cleveland, weighs a great deal with this court in the consideration of this case; she is a little child now, only about three years of age, but after a while she will want to know who her father was, and where her father's body rests. If her father's body is interred in the city of Hamilton she can not go to his grave and pay the tributes of respect and affection that she would like to pay, but if the body rests in the city of Cleveland this little girl can visit that grave, and can plant her flowers there, and show that she loves her father, even though she was only three years of age when he died.

Under all the circumstances of the case, notwithstanding the fact that Ernest Herold expressed a desire to be buried in the city of Hamilton, in Greenwood Cemetery, the court holds that the prayer of the petition will be granted, and awards the custody of the dead body of Ernest Herold to his widow, Sarah J. Herold.

DEMURRAGE AND CAR SERVICE RULES.

[Common Pleas Court of Miami County.]

TROY WAGON WORKS CO. v. C., H. & D. RY. CO.*

Decided, 1903.

Railways—Duty of, with Reference to the Switching of Cars—Arriving by Connecting Lines—Such Service may be Compelled by Injunction, When—Demurrage Charges—Denial of Switching Facilities for Failure to Pay—Legality of Demurrage Bill Disputed in Part—Refusal of Consignee to Pay Disputed Portion.

1. Where the tracks of a railway company lie contiguous to a manufacturing establishment, and are also connected with the tracks of another railroad company, it is the duty of such first company, on request, to switch the cars arriving by said other company, consigned to such manufacturing establishment, to such contiguous tracks of its own, for the purpose of unloading them, under the provisions of Revised Statutes, Sections 3340 and 3341; and where such company, without valid excuse, refuses so to do, the performance of such duty may be enforced by mandatory injunction.
2. When a railroad company has established a rule for the collection of "demurrage" charges, on cars so switched, which are delayed in unloading by the consignee more than forty-eight hours after being placed for unloading, such rule is not an unreasonable one, and a court of equity will not intervene in favor of a consignee who is denied such switching facilities on account of his refusal to comply with such rule, where he is responsible for such detention.
3. When, however, such detention is caused by the acts of the railroad company, and in consequence the consignee, without default on his part, is prevented from unloading such cars within forty-eight hours, he can not be required to pay demurrage on account of such detention, and his refusal to do so will not entitle the railroad company to refuse him a continuance of the switching facilities referred to in the statute.
4. When a railroad company presents to a consignee a bill of "demurrage" charges, the correctness of a large part of which is

* Affirmed by the Circuit Court of Miami County without report, and by the Supreme Court, on March 7, 1905, without report, 72d O. S. 613,

1905.]

Troy Wagon Works Co. v. Railway Co.

bona fide disputed, and demands, as a condition of continuing such switching facilities, the payment of the whole bill, and an unconditional promise to pay all such similar bills that may be presented in future, the refusal by the consignee to make such payment and promise does not furnish a sufficient legal reason to entitle the railroad company to refuse to continue such switching facilities.

JONES, J.

The plaintiff in this action is seeking, by the medium of a mandatory injunction, to compel the defendant railway company to receive from the C., C., C. & St. L. Ry. Co. (generally known as the "Big Four") such loaded cars as arrive at Troy, consigned to plaintiff over the Big Four Road, and to switch the same upon the defendant's track, adjoining plaintiff's factory, and also to receive cars loaded on the same track by the plaintiff and to deliver the same to the Big Four, when intended for shipment over that road, both of which it avers that the defendant refuses to do. The roads of the defendant company and of the Big Four both enter Troy, and are connected by a "Y", but the Big Four tracks do not adjoin plaintiff's factory, and it is only by medium of the C., H. & D. track that the plaintiff can have cars arriving or departing over the Big Four brought to its factory proper, to discharge or receive freight, the C., H. & D. having a loading track immediately adjoining the plaintiff's factory. The plaintiff is a manufacturing corporation, and the defendant and the Big Four company are common railway carriers.

The defendant by its answer denies that it is under any obligation, legal or otherwise, to switch cars upon the side-track adjoining plaintiff's factory, which it denominates a "private side-track." It admits that it has refused to place cars on said "private side-track" or to switch cars from the Big Four tracks to what it denominates "the private yards of plaintiff."

It avers its readiness to place cars intended for the plaintiff's use at reasonably convenient places in its yards and on its side-tracks.

As a reason for refusing to switch cars upon the track adjoining plaintiff's factory, it avers that plaintiff has willfully and intentionally violated and refused to comply with the rules of the defendant company in regard to "demurrage": that is, the defendant company has a reasonable rule requiring all cars placed for loading or unloading to be so loaded or unloaded within forty-eight hours thereafter, and in default thereof that the shipper or consignee be required to pay a charge of \$1 per day for each car so detained beyond such period; which rule the plaintiff willfully and wantonly refuses to comply with. In substance, that the defendant company, in order to secure the enforcement of such "demurrage" rule, has been forced to take the action complained of by the plaintiff.

The plaintiff for reply, after admitting the existence of the rule, but denying that it has violated it, replies further in a second paragraph or paragraphs, which I will read in full:

"The defendant, at the instance and request of the Car Service Bureau, an organization composed of the defendant and other railway companies, presented a bill for car service charges to the plaintiff amounting to about \$400, and claimed that such charges accrued in favor of defendant because the plaintiff had not in the past unloaded cars within the time prescribed by said car service rules. The plaintiff denied liability for a large part of said claim, and the parties, after considerable effort to compromise said claim, were unable to agree upon an adjustment. The defendant then, under the direction of said bureau, demanded that plaintiff promise and agree to pay car service claims presented by the defendant in the future, and upon plaintiff declining to agree in advance before car service had actually accrued, and before it was known that any would accrue, the defendant notified plaintiff that it would not switch any cars for plaintiff and would not place cars on said side-track for plaintiff, and would not place any cars on said side-track for loading and unloading, and said defendant did thereupon refuse to switch cars and place same on said side-track for loading and unloading, as set forth in plaintiff's petition. The plaintiff declined to promise in advance, when requested so to do by defendant, and does now decline to promise or agree in advance to pay such car service claims which defendant may hereafter present, because—

1905.]

Troy Wagon Works Co. v. Railway Co.

"1st. Forty-eight hours is not in any event reasonable time in Troy, and with the track facilities afforded by defendant, within which to load its finished product from the factory, and unload all material and fuel consigned and shipped to plaintiff.

"2d. The defendant, although often requested by plaintiff so to do, has not provided plaintiff with sufficient track room and siding to accommodate plaintiff's business in loading and unloading, and by reason thereof, when a large number of cars consigned to plaintiff are placed upon said side-track by the defendant at one time, it is physically impossible to unload all of said cars within forty-eight hours after their arrival.

"3d. The defendant, in preferring its car service charges against the plaintiff, computes the time in which said alleged car service accrued at the expiration of forty-eight hours from the time said car or cars arrived at Troy, and before they are placed at a convenient and suitable place for unloading, and not from the time same are placed in convenient and suitable places for loading and unloading.

"4th. The right to charge car service can not be imposed and enforced arbitrarily, but in each case the attendant circumstances must be taken into consideration, and the charges for demurrage must, under the circumstances, be reasonable.

5th. The defendant has no lien on the goods shipped or to be shipped for car service charges, and upon the refusal of the plaintiff to pay such charges has no right or power to refuse to switch the cars and refuse to place the same at a convenient and suitable place for loading and unloading, but it is the duty of the defendant, if the car service charges are not paid, to switch cars and place the same at a convenient and suitable place for loading and unloading, and then to depend upon civil processes for the collection of said demurrage charges."

The pleadings are well and carefully drawn, but are necessarily quite voluminous, and without fuller quotation I think the foregoing statement is sufficient for an understanding of what is involved in the case.

The case was heard upon evidence offered by both sides and now stands for decision upon its merits.

It should probably be said here that while the track adjoining plaintiff's factory is referred to in the answer as "a private side-track," yet it is shown by the evidence to be owned by the

defendant company, and under its control, so far as appears from the contract by which it was constructed, and under such contract it is "private" only in so far that it is built on land belonging to the plaintiff company, and that the defendant company would probably have little occasion to use it, except in handling the plaintiff's freights.

The rights of the parties are to be determined with reference to the provisions of Revised Statutes, Sections 3340 and 3341, the first of which reads as follows:

"When the track of a company crosses, connects or intersects with the track of the same gauge of another company, either company may connect the tracks of the two roads so crossing, connecting or intersecting, so as to admit the passage of cars from one road to another with facility, and avoid the transferring of freights from said car. And when the tracks of one company lie contiguous to coal mines, stone quarries, manufacturing establishments, elevators, warehouses, navigable waters or side-tracks suitable for loading or unloading, it shall be the duty of such company to switch the cars of other companies at the request of such companies, or the shippers, over and upon the tracks so lying by such coal mines, stone quarries, manufacturing establishments, elevators, warehouses, navigable waters or side-tracks, for the purpose of unloading or loading grain or other freight into or from such elevators, warehouses, boats upon said navigable waters, or side-tracks, without demurrage for forty-eight hours."

Section 3341 is, to some extent, a reiteration of these enactments, and contains further provisions as to the rates that may be charged for such service.

It clearly appears from these sections that the Legislature intended thereby to facilitate commerce by providing that certain classes of heavy shippers, including manufacturers, should, where practicable, have cars placed at their very doors, even though the company so placing such cars might only do so with no further reward than the switching charges for transferring such cars to the tracks of some other company, when loaded or unloaded. Hence, the duty of the defendant in this case would

1905.]

Troy Wagon Works Co. v. Railway Co.

not be fulfilled by merely placing cars for plaintiff's use at some other "reasonably convenient place", along its tracks or yards—it must place the cars, in the language of the statutes, "upon the tracks so lying by such coal mines, manufacturing establishments," etc.—or it must show reasonable grounds for the omission to comply with the legislative requirements.

The plaintiff, being one of the classes of shippers for whose benefit the statute was enacted, and the track described in the petition being such a track as that mentioned in the statute, the answer of the defendant is a direct admission that it has failed to comply with the provision of a legislative regulation, to which it is subject as a *quasi* public corporation, and after such admission, the burden of proof is upon it to show reasonable ground for such non-compliance.

The reason offered is the alleged refusal of the plaintiff to comply with the regulations of the defendant company, or rather of the Car Service Bureau, in regard to the payment of "demurrage."

"Demurrage" was originally a term applied to remuneration to a ship owner for the detention of his vessel beyond a stated period fixed for loading or unloading. Of later years, however, the usage of exacting demurrage has not been confined to maritime transactions, and it may now be regarded as well settled that a railway carrier may adopt and enforce a reasonable schedule of charges for the detention of its cars beyond a reasonable period for loading and unloading. The statute previously referred to indirectly recognizes such established rule, by exempting cars handled in the manner therein provided, from demurrage for a period of forty-eight hours.

The answer of the defendant avers that its refusal to place cars on the side-track adjoining plaintiff's factory (and in fact the whole difficulty out of which this litigation has arisen), grew out of the wanton and wilful refusal of the plaintiff to comply with the car service rules, not only by refusing to load and unload cars within forty-eight hours, but by refusing to pay demurrage on cars improperly detained beyond that period.

If the proof sustained this allegation plaintiff would not be entitled to the remedy and relief which it is now seeking, for the rule would be applicable, which is laid down (correctly, in my judgment) in the 6th clause of the abstract of the opinion of the court in the case of *The Kentucky Wagon Mfg. Co. v. The O. & M. Ry. Co.*, decided by the Kentucky Court of Appeals, as reported in a published pamphlet entitled "Legal Decisions in Car Service Cases" which counsel have furnished me. The same case is also reported in 36th Lawyers' Reports Annotated, 850 (98th Ky., 152), but I prefer to use, for the purposes of this decision, the quotation from the abstract, as expressing the view I take of this point, as follows:

"Sixth. While common carriers, members of a car service association, have no right to refuse to receive freight from or switch cars for a shipper because he owes to them or other members of the association, car service fees which he refuses to pay, or because he and other shippers have combined to resist the enforcement of the reasonable rules of the association, yet a shipper thus in default can not ask the aid of a chancellor to compel the carrier to do that which it admits it is its duty to do, and which it is willing to do upon a compliance on the shipper's part with the reasonable rules of the association. The shipper having done the first wrong and thus caused the wrong-doing of the carrier, the chancellor may refuse to hear him."

This is an application of the maxim that he who seeks equity must do equity. The shipper, or consignee, can not complain of a wrong provoked by his own wrong-doing.

It appearing in the case that certain bills claimed to be due under the car service rules have been presented to plaintiff and payment refused, is such refusal wanton and wilful, or is it in any way such conduct as would deprive plaintiff of a standing in the court of equity?

It appears from the evidence that the bills in question, amounting to some \$400, contain quite a number of items, the correctness of which is disputed by the plaintiff. I believe that it is not denied that in each instance the car may have stood on the track longer than forty-eight hours (at least I gather that from

1905.]

Troy Wagon Works Co. v. Railway Co.

the evidence) but it is claimed by the plaintiff that in a number of instances the cars were not placed in reasonably convenient places for unloading; that at other times the switch engine, in handling other cars, had to move those consigned to plaintiff, and that the work of loading and unloading was thereby impeded and interrupted, sometimes for several hours at a time, before the cars were replaced where plaintiff's employes could reach them; in short, that in many instances the demurrage arose because the acts of the defendant company itself made it an absolute impossibility for plaintiff to load or unload the cars within forty-eight hours. It is also claimed that on some occasions the cars consigned to plaintiff arrived in such numbers, that though plaintiff had provided an unloading force sufficient in number under any ordinary circumstances to promptly unload the cars yet it was impossible for it to obtain help with the requisite experience to handle so many cargoes within forty-eight hours. The evidence is not very specific in regard to exactly when, or how often these instances occurred, but I think it is sufficient to show that a considerable part of the car service account was in good faith disputed by plaintiff, for reasons aforesaid; nor is the fact negatived by defendants' evidence.

The rule requiring the unloading of cars within forty-eight hours is a reasonable one, but it must receive a reasonable application, and when the carrier calls upon the consignee to observe it, the carrier must not, by his own acts, practically put it out of the power of the consignee so to do, and then complain of the consignee's forced omission, occasioned by the carrier's own act. It is the duty of the carrier to place the car in a proper and reasonably convenient situation for unloading, and if he fails to do so, and in consequence the consignee is prevented from unloading the cars within the time specified in the car service rules, he can not charge or recover demurrage for delay which is caused entirely by such omission on his part. Furthermore, if the cars are originally properly and conveniently placed, but while they are being loaded or unloaded, the carrier removes them for such length of time as to materially

and substantially delay the work of loading and unloading, and in consequence such work is delayed for more than forty-eight hours, he can not charge or recover demurrage for such delay, directly occasioned by such act on his part, and for which the consignee is in no way responsible. I agree in the main with the able and comprehensive charge on this subject given by Judge Van Pelt in the case of *R. R. Co. v. Fisher & Son*, reported in 3 Ohio N. P. Rep., 122, 124. It seems to me that a requirement of this nature is absolutely necessary to a reasonable or fair interpretation or enforcement of the car service rules, unless the shipper or consignee is to be left absolutely at the mercy of the carrier. Otherwise it would be entirely possible for the carrier to place the car at some inaccessible point, or having originally properly placed it, to remove it within the space of an hour to such inaccessible point, and having thus made it impossible for the consignee or shipper to comply with the car service rules, proceed to inflict a penalty on him for such non-compliance.

In the case at bar I understand that the refusal of the plaintiff company to pay the bill in controversy arose, not from its resistance to the car service rules as such, but from an objection to what it claimed to be an improper construction of the rules. If the plaintiff stood in the position of simply resisting generally the right of the defendant to make rules as to demurrage, or the general rule in question, I should hold that it had no standing in a court of equity. If the defendant had shown that the plaintiff was resisting the payment of a bill for charges, all properly imposed under the car service rules, I should make the same ruling. But the situation, in my view, is this: Here are two parties disputing (and no doubt entirely honestly on both sides) as to the liability of the second party to the first on certain contested items. As a means of enforcing payment of such disputed items, the carrier party proposes to decline fulfilling certain legal obligations which it is under toward the consignee, until the consignee pays a bill which it believes it does not owe. This can not be permitted, unless indeed the carrier had made

1905.]

Troy Wagon Works Co. v. Railway Co.

it appear by some fair preponderance of evidence, that it was entitled to payment of the entire disputed account, in which case it might well be doubted whether the consignee would be entitled to ask for any equitable relief. But no such preponderance appears, but on the contrary the evidence rather tends to establish that as to part of the bill the objections of the consignee are well founded.

The defendant has its remedy in a court of law to collect these charges (if properly made) by a civil action. It can not enforce the collection by declining to fulfill part of its duties as a common carrier, and thus compel plaintiff to pay a disputed bill, or suffer injury to its business. True, this might give rise to a multiplicity of suits, but the same evil and in an aggravated form would also result, if the plaintiff were driven to pay these charges under protest, and then sue for their recovery, under the provisions of Revised Statutes, Section 3376. Moreover, such a course, if the plaintiff was compelled to adopt it, as the only alternative to surrendering what it claims to be its rights, would probably not secure it a resumption of the switching service, as the defendant seems to have required as the only terms on which such service would be resumed, not only the payment of the whole bill, disputed items and all, but a pledge from the plaintiff to "observe the car service rules in the future."

Precisely what is implied in this last condition is a little uncertain under the evidence. If it means that hereafter the carrier may exact payment of any claim for demurrage which it may present, and that the wagon company, as a condition of getting car service, must promise in advance to pay all such bills, no matter how unjust, or how incorrect it may claim them to be, it is a demand which the defendant has no right to make under any circumstances. On the other hand, the plaintiff would not be upheld by this court in disputing the general right of the defendant to make demurrage charges, or in resisting payment of such charges in any particular instances, where properly made. But neither party can escape a legal duty by making its performance conditional on the other party promising in ad-

vance to adopt a certain course of conduct. What the parties actually do in the future, not what they now say they will or will not do in some future contingency that may never arise--this is what must determine their legal relations.

However, if I have correctly understood the evidence of Mr. Geiger, the manager of the plaintiff company, his position on its behalf is not that of refusing to pay any and all such charges when properly made. This position, I think, is a tenable one. While it may doubtless cause some inconvenience to particular case, yet the carrier company can not claim to be the sole judge and arbiter of its disputed accounts. Similar contests arise daily between other parties over disputed accounts, and are referred to the courts for adjustment when the parties finally fail to agree. Demurrage accounts stand on no higher or different footing.

Let it be understood, however, that the decision proceeds on the assumption that I have correctly understood the plaintiff's position to be what I have just stated: that the court recognizes the right of the defendant to make and enforce reasonable rules as to demurrage on its cars, and in a proper case would refuse to interfere with such enforcement, even in the manner attempted in the present instance. A case might arise in future, when the plaintiff, or some other shipper, by a disregard of a reasonable demurrage rule, might place itself beyond the right to ask for equitable relief. But as this case now presents itself I think the plaintiff is entitled to the remedy which he seeks. As to the disputed bill the parties must be remitted to their legal rights.

While a portion of the demurrage charges claimed by the defendant may not only be proper but undisputed, yet it would seem that the defendant is seeking to enforce the payment of the entire claim, disputed items and all, as condition of switching cars to and from the plaintiff's factory track. Neither the plaintiff's refusal to pay the bill as a whole, or to give an un-

1905.]

Troy Wagon Works Co. v. Railway Co.

conditional and somewhat indefinite promise as to its future conduct, can be accepted as a sufficient excuse for the defendant's failure to perform a duty enjoined upon it by law. From these conclusions, it follows in the opinion of the court, that at the commencement of this action the plaintiff was entitled to equitable relief, and should now have such mandatory injunction as will prohibit defendant from refusing to furnish it with car service on the track adjacent to its factory, on account of the reasons offered by the defendant in this case.

A decree may be framed accordingly.

Gilbert & Shipman, for the wagon works company.

R. D. Marshall, A. McL. Marshall and A. F. Broomhall, for the railway company.

CONSTRUCTION OF A LICENSE TO MINE COAL.

[Common Pleas Court of Franklin County.]

CLEVELAND TRUST COMPANY, TRUSTEE, v. THE COLUMBUS &
HOCKING COAL AND IRON COMPANY.

Decided, June 19, 1905.

*Mines and Mining—Exclusive License to Mine Coal—Construction of—
Rights Granted—A Lease and Not a Sale—Meaning to be Given
Technical Words.*

1. The use of technical words and phrases in a written instrument, such as "devise," "release," "mine-let," and "royalty," will not be allowed to defeat the manifest intention of the parties as otherwise expressed in the instrument, or to modify the agreement the parties have by the words used actually made.
2. An exclusive lease or right to enter upon, mine, and remove coal from a tract of land, such as is presented for construction in this case, is a lease and not a sale of the property, and the royalties provided therein are in fact rentals and no more.

DILLON, J.

A written agreement was made on September 9, 1885, by virtue of which the defendant received the exclusive right, permission and license to enter upon, mine and remove the coal from a tract of land in Athens county, Ohio. The defendant therein agreed to mine the coal on these premises and to take it therefrom and pay a royalty on not less than fifty thousand tons of coal in each and every year thereafter, and to continue to mine and to pay royalty until all the coal that could be practically mined on the said premises should be so mined and paid for. The defendant further bound itself to conduct such mining operations in a good and workmanlike manner, so that all the coal that could be practically mined should be mined and paid for. The defendant further agreed to pay the sum of ten cents per ton for all lump coal so mined.

1906.]

Trust Co., Trustee, v. Coal & Iron Co.

The contract further provides and declares the intention of the parties to be that such monthly payments under this contract shall be in an amount of at least \$416.67, and that this payment shall be made regularly "whether the monthly proportion of coal on the basis of fifty thousand tons per annum shall have been mined or not, and that any payment so made in advance of coal actually mined, shall be applied as royalty on the coal which may be thereafter mined in excess of the minimum amount herein provided for."

A provision is further made that if the defendant shall fail or neglect for a period of thirty days to make such monthly payment the lease may at the option of the first party, but not otherwise, be declared forfeited and the owner of the property restored to his exclusive possession and ownership of the premises.

A provision is further made that in case mining operations shall be temporarily interrupted by strikes, or means or agencies beyond its control, the obligation to pay during such time shall not be enforced, but "that save and except the period or periods during which the second party may be interrupted as aforesaid, the second party shall be deemed to be liable for the payment to the first party or his successor in said trust, the amount of royalty which would be due under the terms of this contract in respect to coal mined each month the same as if said coal had actually been mined."

The contract further provides that "when the second party shall have mined and paid for all the coal that can be practically mined on the premises hereby demised, and shall have fully performed all the covenants herein stipulated by it to be performed, the second party shall be permitted to remove from said premises its tracks and fixtures."

The petition alleges that no monthly payments have been made since May, 1904, and asks for a judgment against the defendant for \$2,083.33 and interest.

The answer admits the agreement, but says that up to and including the said month of May, 1904, it has paid to the plaintiff in all the sum of \$93,331.96 in monthly payments of \$416.66 each; but that up to said time the defendant has mined and re-

moved from said premises only 734,325.91 tons of coal, and that under the royalty provided in said agreement, to-wit, ten cents a ton, the amount due and payable for the coal actually mined and removed would be \$73,432.59. In other words that the defendant has now paid to the plaintiff the sum of \$19,898.37 more than the royalty at the rate of ten cents per ton would amount to.

The defendant further says that there is now remaining in this tract of land yet to be mined 198,570 tons of lump coal and no more, and that the royalty upon this coal when it has been mined will amount to \$19,857; that therefore the defendant having already advanced the payment in the sum of \$19,898.37, it will have paid to the plaintiff \$41.37 more than the royalty of ten cents per ton will amount to, and that it is, therefore, entitled to mine all the rest of the coal in this land without paying any further royalty.

The demurrer to this answer calls for an interpretation of this contract.

In the case of *Raynolds v. Hanna*, 55th Fed., 783, in construing a will wherein this identical lease was involved, the court (Jackson, J.) held that, in so far as the question arose as to the construction of the will and as to what source to credit the amounts arising therefrom, this agreement was a lease, and that the funds arising thereunder were a part of the income of the estate and should be so distributed and accounted for.

The question presented to this court was not presented to that court nor was it intended by the use of the word "lease" to involve the question raised here. It must be at once apparent, and it will dispense with considerable argument, to say that no particular nomenclature or set phrases are necessary to be used in order to determine the nature of this contract. Even the use of technical words or phrases in an agreement will not be allowed to defeat the manifest intention of the parties as expressed in the instrument, and, therefore, such words as "demise," "re-lease," "mine-let," and "royalty," etc., as used by the parties will not of themselves be sufficient to defeat or modify the agreement which the parties have by the words used actually made.

1905.]

Trust Co., Trustee, v. Coal & Iron Co.

The question before this court is: What does this contract mean?

In one sense it was a sale, for it is apparent that the moment the coal was actually mined the title passed from the owner of the land to the defendant in this case.

The plaintiff's contention is that these royalties of ten cents a ton were in fact rentals and no more; that the instrument in question is a lease and is not a sale of property. The contention of the defendant is that this agreement, considered in its entirety, is strictly a royalty contract, and that the intention of the parties as shown by this agreement was to limit the payment from the defendant to the owners of this property to the rate of ten cents per ton for the coal actually in the land and no more, and that having paid that amount of royalty they are now released from any further payments.

Probably the most important clause of this contract is the one quoted above where it is expressly declared to be the intention of the parties that a payment of \$416.67 shall be made each month, whether the monthly proportion of coal shall have been mined or not. If we stop at this point to analyze the contract, it would be evident in the absence of any other provisions that the contention of the defendant here could not prevail, because up to this point it is apparent that the amount to be paid should be \$416.67 whether they mined any coal or not, and the provision of ten cents per ton was simply a favor to the defendant and is a limit beyond which the owner of the property could not demand. The clause so far would show that not only was one of the considerations of this contract definitely fixed as to guarantee and secure to the owner of the premises a speedy and diligent mining of the coal, but the parties themselves agree that however small an amount of coal may be mined the value of this property under this contract shall be in the sum of \$416.67 per month subject only to the limitation which follows.

And at this point, we see the parties preparing for a condition which might exist, to-wit, that in the ordinary conduct of the business there might be occasions when the defendant would mine only half that amount of coal—that is to say that while they would be compelled to pay \$416.67 as a matter of fact, they

might only mine a less amount of coal than was their privilege for said sum. To provide for any such natural fluctuation the clause continues that "any payment so made in advance of coal actually mined shall be applied." How? To one exclusive source, to-wit: "On the coal which may be thereafter mined in excess of the minimum amount herein provided for." This contract therefore means that the rate of ten cents per ton of coal was not an exclusive rate that they were to pay, but that in case they did not mine the coal fast enough the rate should be higher, and this was the penalty expressly provided for in case they operated the mines slower than provided for.

It is claimed that this construction of the contract will be unconscionable and will result in compelling the defendant to pay to the plaintiff a larger sum than ten cents per ton royalty.

To the last part of this contention the court must agree, but that it would be unconscionable the court can not agree, because the parties themselves have expressly provided that under certain conditions the "royalty" or payment will as a matter of fact exceed ten cents per ton for all the coal actually mined; by the contract itself the parties have provided for only one place to which the surplus money may be applied and that is to the coal which is thereafter mined "*in excess of the minimum amount herein provided for.*"

The case of *Tod v. Stumbaugh*, 37th Ohio State, 469, is quite in point, although the decision discussing the subject matter is very brief.

The conclusion, therefore, to which this court has come is that the demurrer to the answer is sustained.

If the defendant does not desire to further plead a final judgment will be entered; otherwise ten days given in which to amend. Exceptions will be noted.

W. O. Henderson, for plaintiff.

Outhwaite, Linn & Thurman, for defendant.

1906.]

Schlagel v. State and Forsythe v. State.

**PROSECUTION FOR KEEPING SALOON OPEN ON
SUNDAY.**

[Common Pleas Court of Licking County.]

**KATE SCHLAGEL v. THE STATE OF OHIO; AND S. E. FORSYTHE
v. THE STATE OF OHIO.***

Decided, September, 1904.

*Liquor Laws and Sunday Laws—Keeping Open on Sunday—Place
Where Intoxicating Liquors are Sold—Prosecution for—Mayor's
Jurisdiction—Trial by Jury—Affidavit—Weight of Evidence—
Pleading.*

1. Imprisonment is not part of the penalty, where it is imposed only to enforce payment of a fine and costs under a police regulation; and it follows that error does not lie to a refusal by a mayor to grant a trial by jury to one charged for the first time under Section 4364-20 with allowing a saloon to remain open on Sunday.
2. An affidavit for arrest under this section is sufficient when the defendant is charged with keeping a place open on Sunday, "the same being a place where intoxicating liquors are on other days of the week exposed for sale and sold"; the exception provided by the statute must in such a case be established by the defendant, and it is not necessary that it be pleaded.
3. On review of a prosecution before a mayor, the court is not called upon to consider the weight of the evidence, where the bill of exceptions does not show that it contains all the evidence.

SEWARD, J. (orally).

The case of Mrs. John Schlagel v. The State of Ohio is a petition in error from the docket of the mayor of this city. The action is prosecuted to reverse the judgment of the mayor.

The errors complained of are ten in number, as follows:

- 1st. Said mayor erred in overruling the motion of the plaintiff in error for a trial by jury.
- 2d. Said mayor erred in overruling the motion of the plaintiff in error to quash the affidavit and dismiss the proceedings.
- 3d. Said mayor erred in overruling the motion of the plaintiff

*Affirmed by the circuit court; see note at end of opinion.

iff in error to require the state to elect upon which of the several charges and offenses contained in said affidavit it would proceed to try the plaintiff in error.

4th. The mayor erred in overruling the demurrer of the plaintiff in error to the affidavit filed against her.

5th. The mayor erred in admitting improper testimony on the part of the state, objected to by the plaintiff in error.

6th. The mayor erred in excluding competent testimony offered by the plaintiff in error, which was excepted to.

7th. The mayor erred in refusing to set aside the sentence of the defendant upon her motion made therefor.

8th. There was no legal arraignment in said case.

9th. The judgment and sentence of said mayor was contrary to law, and invalid.

10th. The mayor erred in overruling the motion of the plaintiff in error for a new trial, which was excepted to.

The plaintiff in error (defendant below) was arrested under the provisions of Section 4364-20, which provides against the sale of intoxicating liquors on Sunday, or allows any place where intoxicating liquors are on other days sold to be open or remain open on that day, and provides that any person who violates that provision of the statutes shall be fined in any sum not exceeding one hundred dollars and not less than twenty-five dollars for the first offense.

The provisions in that statute are found in 95 O. L., page 87:

“That the sale of intoxicating liquors, whether distilled, malt or vinous, on the first day of the week, commonly called Sunday, except by a regular druggist on a written prescription of a regular practicing physician for medical purposes only, is hereby declared to be unlawful, and all places where such intoxicating liquors are on other days sold or exposed for sale, except regular drug stores, shall on that day be closed, and whoever makes any such sales, or allows any such place to be open or remain open on that day shall be fined in any sum not exceeding one hundred dollars and not less than twenty-five dollars for the first offense, and for each subsequent offense shall be fined not more than one hundred dollars or be imprisoned in the county jail or city prison not less than ten days and not exceeding thirty days, or both.”

1905.]

Schlagel v. State and Forsythe v. State.

It will be observed that the only penalty inflicted by this section of the statute for the first offense is a fine.

Mrs. Schagel was tried and convicted by the mayor without the intervention of a jury, although she demanded that a jury be impaneled, and that the issues involved be submitted to a jury. This demand on her part for a trial by jury was evidently made under Sections 5 and 10 of Article I of the Constitution of Ohio.

Section 5 of Article I provides that the right of trial by jury shall be inviolate.

Section 10 of the same article provides that *except* in cases of impeachment and cases arising in the army and navy or in the militia when in actual service in time of war or public danger, and in cases of petit larceny and other inferior offenses no person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury.

In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Nor shall any person be compelled in any criminal case to be a witness against himself, or be twice put in jeopardy for the same offense.

This is Article X of Section 1.

Now, taking up the errors as they are numbered: The first assignment of error is as to the refusal to grant the defendant a jury trial. If she was entitled, under the Constitution and the law to a jury trial, then there was error committed in refusing it. If she was not entitled to a jury trial, then there was no error committed in refusing it.

It has been well settled in Ohio that where imprisonment is not a part of the penalty, the accused is not entitled to a trial by jury, although the imprisonment may be ordered as a

means of enforcing the penalty (42 O. S., 186). I wish to refer to that decision because it strikes this question pretty squarely:

"A statute which authorizes a penalty by fine only, upon a summary conviction under a police regulation or of an immoral practice prohibited by law, although imprisonment, as a means of enforcing the payment of the fine is authorized, is not in conflict with either Section 5 or 10 of Article I of the Constitution, on the ground that no provision is made for a trial by jury in such cases."

This, as I recollect it, was a case where the defendant was arrested upon a charge of keeping a gambling house. After disposing of Section 5 of Article I, McIlvaine, J., says:

"A more difficult question arises on Section 10 above referred to. This section reads: 'Except in cases of impeachment, and cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and in cases of petit larceny and other inferior offenses, no person shall be held to answer a capital or other infamous crime, unless on presentment or indictment of a grand jury. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witness face to face and to have compulsory process to procure the attendance of witnesses in his behalf; and to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.'

"The question is: Was the phrase 'in any trial, in any court' intended to apply to cases like the present, where the penalty is by fine merely, inflicted on the violator of a mere police regulation, only *quasi* criminal? A class of cases for the punishment of immoral and pernicious practices by pecuniary penalties, but in which, by the common law, as above shown, the accused was never entitled to demand a trial by jury. The provision of the Constitution is, that the person accused shall have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed—accused of an offense, to-wit, such an offense as would, before the adoption of the Constitution, have entitled the accused to a jury trial. This provision, in our opinion, was not intended to extend the right of jury trial, but was intended to define the characteristics of the jury.

1905.]

Schlagel v. State and Forsythe v. State.

"In *Thomas v. Ashland*, 12 Ohio St., 124, it was held that an ordinance of a village which imposed imprisonment as a penalty for an offense, where no provision was made for a trial by jury, was in conflict with Section 10 of the 1st article of the Constitution above quoted; but the court was careful to exclude from the operation of the rule there laid down cases where the punishment was by fine only, although imprisonment was authorized as a means of enforcing the payment of the fine. We think the discrimination between imprisonment as part of the penalty, and as a means of enforcing the penalty, is well made. Hence, we find no constitutional objection to the statute under which Inwood was arrested."

The judge says on page 188:

"It is true for offenses strictly criminal or infamous, punishment can only be inflicted through the medium of an indictment or presentment of the grand jury. There are, however, many offenses made so by statutes which are but *quasi* criminal, and in which the Legislature may direct the mode of redress untrammelled by the Constitution; such as Sabbath breaking, selling spirituous liquors on Sunday and the disturbance of religious meetings."

So, the court clearly hold there that, in a case of this kind, the party is not entitled to a trial by jury. Now, I might say that the imprisonment inflicted in this case was until the fine and costs were paid. But, that is not a part of the penalty. The penalty authorized by this statute for the first offense does not include imprisonment, and imprisonment was imposed by the court only as a means of enforcing the penalty.

The second error complained of is the overruling of the motion to quash the affidavit, because the affidavit is insufficient in law to authorize the mayor to take and exercise final jurisdiction without the intervention of a jury; that it is insufficient in law to warrant the mayor in trying the defendant and imposing any punishment.

This motion attacks the jurisdiction of the mayor from all quarters. It follows from what I have said that if he had jurisdiction at all, he had the power to try the case without a jury. Did he have jurisdiction at all? This must be determined by the statutes, for, being a court of limited jurisdiction, he can

only have such jurisdiction as the statutes have conferred upon him.

Section 1817 of the Revised Statutes provides that the mayor shall have *final* jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is by the Constitution entitled to a trial by jury, and his jurisdiction in such cases shall be co-extensive with the county.

Having found that the accused is not entitled to a trial by jury, the statute gives the mayor final jurisdiction in this kind of a case. We have seen that the accused was not entitled to a trial by jury under the Constitution, and it necessarily follows that under this section the mayor had the right to try the case, and, as a necessary consequence, that he had ample authority to impose the penalty by fine and enforce its payment by imprisonment.

I refer to Section 7249 as to a motion to quash; to Section 7250 as to a plea in abatement; as to when they may be made; as to when they are proper to be made; to Section 7253, as to when waived. The court will not refer to them further, as the time is short. .

The third assignment of error is that the mayor refused to require the state to elect upon which charge it would proceed.

The first count in the affidavit charges the defendant with allowing her saloon to remain open on Sunday, the fourth day of January, 1903. The second count charges the defendant, on the same day, with selling intoxicating liquors.

Both of the charges against the defendant are brought under the same section of the law, presumably growing out of the same transaction. If this motion were well taken—and the court does not think it is—there could be no error, because she was only convicted on the first charge.

The fourth assignment of error is predicated upon the overruling of the demurrer to the affidavit, and this raises the question as to whether the facts stated in the affidavit are sufficient in law to constitute an offense even if true.

Counsel's argument, in the main, was directed at the grammatical construction of the sentence containing the words 'the

1905.]

Schlagel v. State and Forsythe v. State.

same being a place where intoxicating liquors *are* on other days of the week exposed for sale and sold,' etc. It is claimed that the verb "are" denotes present time, and can have no reference to a past event. But this clause of the affidavit follows the act of the Legislature defining the offense, and quotes the language used by the Legislature in the act. The framers of the Constitution provided that the accused shall be furnished with the nature and cause of the accusation against him. Does this affidavit furnish the defendant with the nature and cause of the accusation against her? She is charged with allowing her saloon to remain open on Sunday, the 4th day of January, 1903. This branch of the affidavit clearly informs her of the nature of the charge against her. It is not a necessary ingredient that sales of intoxicants be made on that day, but it is necessary that it be a place where intoxicating liquors are—it may be subsequently—sold or exposed for sale on other days.

I refer to 35 Ohio State, 268, where the court holds that it is not good practice to use other than the language contained in the section of the statute in an indictment. I read from page 269:

"In charging an offense in an indictment, it is not good practice to omit the words of the statute which define the crime. The safer course is to employ them; and, while this is not always indispensable to the validity of the indictment, it is clear that if they are omitted the defect will be fatal, unless the words used are the precise equivalent of the words of the act, or, at least, plainly and necessarily include them."

There is something said about the negative contained in this section of the statute. The 58 Ohio State disposes of the question, that it is not necessary to plead the negative part of the statute. The negative in this kind of a case must be established by the defendant. I cite a case found on page 676, and I read from the 4th syllabus (58 Ohio State):

"Where an exception or proviso in a criminal statute is a part of the description of the offense, it must be negated by averment in the indictment in order to fully state the offense; but when its effect is merely to except specified acts or persons

from the operation of the general prohibitory words of the statute, the negative averment is unnecessary."

There is an apparent defect in the record, as will appear from an examination of the copy of the affidavit—this was not called to the attention of the court, but the court calls the attention of counsel to it—wherein it does not appear that any proper venue is laid in the first charge, a pen having been run through the words "at the county and state aforesaid," so that there would be no offense charged, if the original affidavit were not attached to and made a part of the record. The original affidavit properly lays the venue, and I take it that the pen was inadvertently run through that part of the copy. So that the court did not err in overruling the demurrer.

The fifth ground of error is the receiving of improper evidence.

The court does not find that any improper evidence was received. Neither does it find that proper evidence was excluded.

It is contended that there was no legal arraignment. The record shows affirmatively that the defendant was arraigned (see transcript of docket entry, pages 1 and 6). I can not see how that gentleman can claim that there was no arraignment here, especially when the record appears as it does.

"MR. FITZGIBBON: It is on the transcript.

"THE COURT (continuing): Counsel for the defendant waived the reading of the affidavit, and plead not guilty."

Now, I suppose counsel intended to claim to the court that they have no right to do this.

But the statute gives counsel a right to do it. It was said by counsel in the argument, that the defendant ought to be present. "The defendant not being present at the trial, her attorneys then demanded a jury." It is not disclosed whether she was present when the plea of not guilty was made or not; but it says in the record and in the bill of exceptions that a plea was entered of not guilty. Section 7257 provides:

"The accused shall be arraigned by the clerk of the court or his deputy reading to him the indictment, unless the accused,

1905.]

Schlagel v. State and Forsythe v. State.

by himself or his attorney, waive the reading of the same, and he shall then be asked by the court whether he is guilty or not guilty of the offense charged."

So, there is no error in that.

It is claimed that the defendant was not informed of the judgment of the court, and asked whether she had anything to say why the judgment of the court should not be pronounced against her. That is governed by Section 7318, Revised Statutes:

"Before sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be pronounced against him."

That seems to be mandatory. But, the record does not show but what that was done. It does not show affirmatively that it was not done; and it is held that where it does not affirmatively appear that it was not done the court will presume that what is required by the statute to be done was done; that is, that it will not be *presumed* that the court did not do its duty under the statutes. The record does not show affirmatively that it was not done. It is presumed that the court did what was necessary under the circumstances. There are a number of decisions sustaining the court upon that proposition. Unless the record affirmatively shows that the defendant was not asked why sentence should not be passed, the law presumes that what the court ought to have done in that case, he did do. It would seem that this is a necessary prerequisite to the passing of sentence; but the record does not show that it was not done. I cite 23 Ohio State, 349; 28 O. S., 669; and 27 O. S., 572.

It is claimed that the judgment was against the law and the weight of the evidence. The court is not called upon to consider the weight of the evidence, as it is not pretended, so far as the bill of exceptions shows, that all of the evidence is set out. The certificate of the mayor does not show that all the evidence is set out in the bill of exceptions, and so the court does not consider that matter at all. The court cites on that

question 33 O. S., 77; 30 O. S., 104; 18 O. S., 477-480; 18 O. S., 418.

So the court find that there are no errors in these two cases—the cases against Schlagel and Forsythe—and the judgment of the mayor will be affirmed, with exceptions.

S. L. James and Smythe & Smythe, for plaintiffs in error.

J. R. Fitzgibbon, for defendant in error.

NOTE.—The circuit court, in affirming the judgment in these cases, said: “All the questions in each of the cases were fairly and ably disposed of by the common pleas judge (Seward), and we agree with his conclusions in each case, and his reasons therefor.”

LIABILITY OF STREET RAILWAY FOR PROPORTION OF STREET ASSESSMENT.

[Common Pleas Court of Franklin County.]

THE URBANA, MECHANICSBURG & COLUMBUS RY. CO. v. THE CITY OF COLUMBUS ET AL.

Decided, June 25, 1905.

Street Railways and Street Assessments—Ordinance Granting Franchise—Construction of Provision of—Relating to Company's Share of Cost of Street Improvement—An Assessment Includes All Items Entering into the Improvement.

1. Under an ordinance granting a street railway franchise containing a provision that, if on said street a pavement has already been laid and an assessment therefor placed on the tax duplicate, and that said company shall pay to the city such proportion of the assessment for said improvement as the space occupied by its tracks and one foot on the outside of the outer rails thereof bears to the entire width of the improved roadway: *Held*, That the railway company is bound by its contract to pay said proportion of the assessments made and levied upon the feet front of the abutting property, and can not defend upon any of the grounds that would have been available to abutting lot owners, or to the company if not bound by such contract obligations.

1905.]

Railway Co. v. City of Columbus et al.

2. In determining the width of such an improved street where the curb on each side thereof was constructed at the same time of said improvement, the curb is a part of the improved roadway, and should be computed.

EVANS, J.

By agreement of parties, trial by jury is waived and the case is submitted to the court on the evidence and argument of counsel.

My finding of facts and conclusions of law are as follows:

FINDING OF FACTS.

The plaintiff is a corporation organized under the laws of Ohio with its principal place of business in Columbus, and by its charter it is authorized to construct, equip and operate an electric railway from Urbana to Columbus. On November 19, 1900, the City Council of the City of Columbus passed an ordinance, Number 17524, which was approved by the mayor of said city on November 26, 1900, and which ordinance was duly accepted by the plaintiff herein. By the terms and conditions of the ordinance the plaintiff was permitted to construct and operate an electric railway line, with single and double tracks upon and across certain streets of said city upon the consent of a majority of the property owners on said street having been theretofore obtained and filed with said council.

The streets of said city upon which plaintiff was authorized and permitted to construct and operate said railway was, among other streets, on and over Spring street from its intersection with Dennison avenue, in an easterly direction to Water street. That Section 4 of said ordinance provided, among other things, the following:

“If the city council, at any time, orders the improvement of the roadway of any of said streets or avenues by laying down thereon a pavement of any kind, said grantee and assigns shall, at their own expense, improve that portion occupied by the tracks of said road and one (1) foot outside thereof, with the same character of material as is used on the remainder of the streets; or, if on the said streets and avenue a pavement has already been laid and an assessment therefor placed on the tax duplicate, said company shall pay to the director of accounts of

the city of Columbus, Ohio, such proportion of the assessment for said improvement as the space occupied by said tracks and one foot on the outside of the outer rails thereof, bears to the entire width of the improved roadway."

That the plaintiff has constructed and is operating said electric railway on the said streets in said ordinance prescribed, including said Spring street from Dennison avenue to Water street.

That prior to the passage of said ordinance by said council and the acceptance thereof, permitting plaintiff to so construct and operate said railway on said streets, and on May 7, 1888, said city council of the city of Columbus adopted a resolution declaring it necessary to improve Spring street from High street to Dennison avenue, by constructing thereon a stone block, (Hayden block), asphalt or hard burned brick pavement, and setting six inch curb, and that such improvement be made under the legislative act of the General Assembly of Ohio, passed May 11, 1886. Said resolution provided that the civil engineer be directed to prepare and report to said council a plat, together with a detailed estimate of the cost and expense of the proposed improvement, and show the dimensions, taxable valuation, and owner's name of each lot or parcel of land bounding or abutting upon the same. Said resolution was published for two consecutive weeks in a newspaper of general circulation in said city.

That on March 18, 1889, said city council passed an ordinance, Number 4647, to provide for the improvement of Spring street from High street to Dennison avenue; that said ordinance provided that said Spring street from High street to Dennison avenue shall be improved by grading and constructing a stone block (Hayden block), asphalt or hard burned brick pavement and setting six inch curb; that bonds of the city shall be issued by the council from time to time, as said improvement progresses, to provide for the cost and expense, to an amount not exceeding the contract price of the work and the other expenses attending the same, and interest, not to exceed six per cent., per annum, payable semi-annually, and shall extend over a period of ten

1905.]

Railway Co. v. City of Columbus et al.

years; that when the whole work is done, the amount of the bonds sold to pay for the same and the interest thereon to the next interest day, when assessments can be collected, shall be taken as the cost of said improvement, to be paid by the abutting property owners, and such amounts shall be assessed equally by the front foot of property fronting or abutting on the same improvement; the assessments therefor to be payable in semi-annual installments to meet the bonds provided for in said ordinance, according to the legislative act of May 11, 1886, as amended March 21, 1887.

That on November 18, 1889, said city council passed an ordinance, Number 5319, whereby it was ordained that the sum of eleven dollars, ninety-two cents and 6 1-10 mills be and the same is hereby levied and assessed upon each front foot of the several lots of land bounding or abutting upon Spring street from High street to Dennison avenue for the cost and expense of constructing said improvement, which was Medina stone pavement, and setting five inch curb along the same.

That said assessment was under said ordinance, certified to the county treasurer for collection against the owners of real estate bounding and abutting on said street between High street and Dennison avenue.

That the width of Spring street from High street to Water street, from curb to curb, is forty-six and one-half feet. That the width of said Spring street from Water street to Dennison avenue, from curb to curb, is thirty-six feet.

That the distance from the west curb line of High street, which is the east end of said improvement on Spring street, is 925.9 feet; that the distance from the west curb line of Water street, on said Spring street, to the west end of said improvement at Dennison avenue is 1339 feet; that there are 5408 square yards of pavement on said Spring street between the west line of Water street and the west terminal of said improvement at Dennison avenue.

That plaintiff's said railway occupies said Spring street from Dennison avenue to said Water street with its railroad tracks and one foot on the outside of the outer rails, a width of 16.7 feet; that there are 2549 square yards of pavement included

between the rails and one foot on the outside of the outer rails of said railway, from Water street to Dennison avenue; that the total number of square yards of pavement in said improvement are 10994; that the total cost of said improvement from High street to Dennison avenue assessed against the abutting property thereon was \$46,195.90. That the total number of feet front bounding or abutting on said improvement against which the cost and expense of said improvement was assessed are 3873.52; that the number of feet front from Water street to Dennison avenue which was assessed for said improvement was 2397.92; that the total amount assessed against said frontage between Water street and Dennison avenue was \$28,597.84; that the amount per front foot assessed against said abutting property for said improvement was \$11.926.

That the amount of the total cost and expense of said improvement, which as heretofore found is in the sum of \$46,195.90, is made up as follows:

10,994 sq. yds. pavement at \$3.70.....	\$ 40,670.80
62 sq. yds 2d class pavement at \$3.00.....	186.00
3,710 ft. curb at 46 cts.....	1,706.60
213½ ft. circle curb at 92 cts.....	196.42
160 ft. curb reset at 20 cts.....	32.00
1090 sq. yds. stone pavement relaid at High St., \$1.00	109.00
	<hr/>
	\$ 42,907.82

Amount paid the contractor for extra work:

Repaving sidewalk at High, Wall and Front Sts...	29.84
Grading and leveling at Wall street, 25 sq. yds. at 40 cts.....	10.00
Resetting curb S. E. corner Ohio Penitentiary.....	3.00
Grading intersections of Water and West streets....	12.00
15 yds. additional stone at State avenue, at \$1.25....	18.75
Grading State avenue approach 242 yds. at 40 cts...	96.80
Grading sidewalk 260 yds. at 40 cts.....	104.00
Grading sidewalk Walcutt property 236 c. yds., at 40 cents	94.40
Grading in front of Ohio penitentiary, 844 c. yds. at 40 cents	253.20
	<hr/>
Total extra work	\$ 621.99

1906.]

Railway Co. v. City of Columbus et al.

In addition there was added to said cost and expense of said improvement:

Constructing catch basins	\$ 787.66
Issue of bonds	51.36
Advertising	8.25
Salary of superintendent of work	173.00
Six per cent. interest on \$48,000.00 from July 1, '89, to January 1, '90.....	1,440.00
357 ft. curb to be credited at 46 cts.....	164.22
160 ft. curb to be credited at 26 cts.....	41.60
Total cost and expense.....	\$ 46,195.90

That the entire cost of said improvement was equally assessed against the property bounding or abutting on said improvement for its entire length from High street to Dennison avenue—that is, the property fronting or abutting on said street from Dennison avenue to Water street, which street between said points is 36 feet in width from curb to curb, were assessed proportionately per front foot exactly the same as the property fronting or abutting on said improvement from Water street to High street, between which latter points said improved street is 46½ feet in width from curb to curb; that a five inch curb on each side of said street was put in as a part of said improvement between Water street and Dennison avenue; that the entire width of the improved roadway on said Spring street between Dennison avenue and Water street, including said curbs, is 36 feet and ten inches.

That plaintiff did before constructing its said railway on said Spring street, by a demand of defendant before defendant would permit plaintiff to construct the same under said ordinance authorizing plaintiff to construct said railway, pay to the treasurer of defendant a rebate for and on behalf of the abutting property holders on said street between Water street and Dennison avenue on account of said street improvement, the sum of \$13,266.35; that plaintiff objected to paying a sum for said rebate in excess of \$11,872.56, under said ordinance, but that said defendant and said treasurer would not permit plaintiff to proceed with the construction of said railway until

the full amount of \$13,266.35 was paid by plaintiff to said treasurer; that in order to proceed with its said construction plaintiff did pay said full amount, but paid under a protest the sum of \$1,393.69, which is the difference between the sum demanded by defendant and the sum that plaintiff claimed was the full amount due from it as such rebate by said ordinance.

CONCLUSIONS OF LAW.

1. I am of the opinion that by the terms of the contract as stipulated in Section 4 of the ordinance of said city council, passed November 19, 1900, that the plaintiff can not question the validity of any of the items of cost and expense of said improvement of said street that are embodied in the assessment therefor against the property fronting or abutting thereon, and which were certified to the county treasurer and placed on the tax duplicate for collection. Under Section 4 of said ordinance there is a vast distinction as to the liability of said railway company as to a street that is paved after the construction of a railway thereon, and a street that is already paved and improved before the construction of the railway.

In the former case it is expressly stipulated that if the city council at any time orders the improvement of the roadway of any of said streets or avenues by laying down thereon a pavement of any kind, said grantee and assigns, shall, at their own expense, improve that portion occupied by the tracks of said road and one foot outside thereof, with the same character of material as is used on the remainder of the streets.

While the question of liability in a case above stated is not before the court, because this improvement was already made when the railway was constructed, and here comes under the next succeeding paragraph of said section. Yet in construing the latter paragraph the apparent disproportion of the two provisions should be pointed out.

I think there is no doubt but that under the first provision all that the railway company would be liable for would be the actual cost to it of the improvement of that portion of the street actually occupied by its tracks and one foot outside of the outer

1906.]

Railway Co. v. City of Columbus et al.

rails, and this would be true independent of what the remainder of the improvement cost to the city, and independent of the cost and expense of curbing, intersections, catch-basins, etc. And if the railway company would not construct this work itself, and if the work of constructing said pavement on the portion of the street occupied by the tracks were then done by the city, under this contract the city could not charge or assess against the railway a sum in excess of the actual cost of improving that portion of the street occupied by the tracks and one foot outside, except, perhaps, an additional expense necessary, such as services for the superintendent while directing that part of the work.

But under the second provision of the contract, the one under consideration here, it will be observed that it does not stipulate that the railway company shall pay the actual cost and expense of constructing the improvement on that part of the street to be occupied by the tracks of the company and one foot outside.

If it did so provide then there would be no disproportion between the two provisions so far as the liability of the company is concerned. But instead thereof it provides that the railway company shall pay such *proportion of the assessment* for said improvement as the space occupied by said tracks and one foot on the outside of the outer rails thereof bears to the entire width of the improved roadway.

Now, this improvement has been made, and all the expense thereof incurred, the assessment determined and placed on the duplicate against the abutting property about ten years before the said ordinance granting permission to the plaintiff to construct its road on said street was passed.

It is presumed that the plaintiff at the time of the passage of said ordinance, and of its acceptance thereof which then made it a contract between plaintiff and defendant, knew what the cost and expense of said improvement was, and knew that said street had a greater width from High street to Water than it had between Water street and Dennison avenue, and also knew what sum had been assessed against the property fronting and abutting on said street. This was all a matter of public record. And

even if the plaintiff did not take the pains to ascertain the amount of said assessment, it entered into a contract as to a street already paved and an assessment therefor long before placed on the tax duplicate, and obligated itself to pay such proportion of that assessment as the space occupied by its tracks and one foot outside bears to the entire width of the improved street.

The assessment means the aggregate of the entire cost of whatever items it may be composed, and independent of the manner in which the city saw proper to assess those on the narrow end of the street equally with those on the wide end.

This is the contract and plaintiff is bound by it, and for this reason plaintiff is not in the position of an abutting property holder on the street, or in a position it would be itself if the city would improve a street on which the railway already had its tracks, for in the latter event there would be the absence of a contract to pay such a proportion of an assessment already made and placed on the tax duplicate.

My finding, therefore, is on this branch of the case that the plaintiff should pay such proportion of the amount assessed for said improvement of said Spring street between Water street and Dennison avenue, to-wit: \$28,597.84, as the space occupied by its tracks thereon, and one foot on the outside of the outer rails thereof bears to the entire width of the improved roadway.

2. I am of the opinion that the entire width of the improved roadway on said Spring street between Water street and Dennison avenue should include the curb on each side of the street. Consequently, the entire width of said street between said points is 36 feet and ten inches.

My reasons for reaching this conclusion are:

(1). The evidence shows that the said street as a part of this improvement had new curbing placed along on both sides of said street between said points.

(2). The contract, which is the second provision of said Section 4 of said ordinance: Said company shall pay such proportion of said assessment * * * as the space occupied by its tracks and one foot on the outside of the outer rails bears to the entire width of the *improved roadway*.

1906.]

Railway Co. v. City of Columbus et al.

Now, the evidence shows that the driveway between said points on said street is 36 feet, that is, from curb to curb. Under this contract the plaintiff can not be restricted to the width of the driveway merely, because the contract makes no such limitations, but, instead, its language is, "bears to the entire width of the improved roadway." The curb is certainly, in my opinion, a part of the improved roadway, not because it is used for driving over it, but because it is indispensable to that part which is so used, and without it there could be no perfect and complete roadway.

This improved roadway including the curb, which I have found is a five inch curb on each side, is 36 feet and 10 inches wide between said points. In figures and decimals it is 36.833 feet wide.

The space, as heretofore found occupied by the tracks and one foot outside of the outer rails is 16.7 feet.

The amount of said assessment between said points is \$28,597.84; this sum multiplied by 16.78 and divided by 36.833, if I figured correctly, is \$12,966.19, which sum I find is the true amount of the rebate that plaintiff owes defendant. Subtract said sum so found from \$13,266.25, the amount paid by plaintiff, and the difference, which is \$300.06, I find is the amount that plaintiff is entitled to recover from the defendant.

My finding, therefore, is in favor of the plaintiff against the defendant, and that plaintiff recover from defendant the sum of \$300.06.

Cyrus Huling for plaintiff.

J. M. Butler, for defendant.

**SPECIAL VERDICTS—PROBATIVE AND DETERMINATIVE
FACTS.**

[Superior Court of Cincinnati, Special Term.]

MARY GINN, BY GEORGE W. GINN, HER NEXT FRIEND, V. FRED
L. MYRICK ET AL.

Decided, October 5, 1905.

*Office of the Special Verdict—Findings by Jury—Determinative Facts
Supporting a Judgment—Silence of Jury Upon an Issue Requiring
a Finding.*

1. Probative facts or conclusions of law contained in the findings of a special verdict must be wholly disregarded by the court, when it comes to scrutinize the legal value of the facts found; and judgment will be granted only when determinative facts sufficient for its support remain, after the verdict has been stripped of all improper matter.
2. Where the immaturity of the plaintiff is set out in an action for damages sustained in the service of the defendant, and the answer is a general denial and contributory negligence is not pleaded, the rule which requires the plaintiff to show that he was without fault does not apply, and the silence of the jury upon that question does not amount to a finding against the plaintiff.
3. Where the gravamen of the petition is the failure to have a dangerous machine guarded, and failure to instruct an immature person in the handling of the machine, it is not necessary that the jury state the various mental processes by which they reached the determinative and ultimate findings in favor of the plaintiff.

HOFFHEIMER, J.

Ruling on motion for judgment.

The action was for damages for personal injury. At the conclusion of the evidence, defendants filed a written request to direct the jury to return a special verdict in writing upon all the issues in the case. The motion was granted under the statutes, and the court instructed the jury accordingly.

The petition in substance averred that plaintiff was hurt while operating a dangerous machine, which defendants negligently failed to guard, and that plaintiff was young and of im-

mature years, and that the accident was without fault on her part. The answer was practically a general denial. Before the court came to charge the jury, counsel for both sides requested leave to submit to the jury for their guidance, drafts of special verdicts on the issues. Leave was granted in accordance with what I believe was the most approved practice. (22 Ency. Pl. & Pr., 993). Among other things the court instructed the jury that if the evidence warranted, they were privileged to find the facts set forth in either draft of verdict; that they could modify or change either draft in whole or in part, or in any particular; that they might disregard them entirely if they saw fit, and that they might return such special verdict of their own as in their judgment the evidence warranted (*Pittsburg Ry. Co. v. Ruby*, 38 Ind., 294). The special verdict rendered by the jury consisted of a number of findings as prepared by the respective counsel; some had been modified. The jury also found the amount of damage. In due course, motions for judgment on the verdict were filed by both plaintiff and defendants. The question now is, were sufficient material facts found by the jury upon which to predicate a judgment either way.

The office of a special verdict is to find facts as to all material issues. Probative facts or conclusions of law contained in the findings must be totally disregarded by the court when it comes to scrutinize the legal value of the facts found. If the special verdict is stripped of all improper matter, and there still remain determinative facts sufficient to support a judgment, judgment will be granted accordingly.

Defendants based their claim for judgment on the ground that the verdict rendered is insufficient in law to sustain a judgment for plaintiff, because:

- (1) Of the failure of the jury to find facts that sustain the allegation that the guard was improper and insufficient.
- (2) That the verdict does not find that plaintiff herself was without fault.

Considering the second objection first: It is true there is no finding that plaintiff was without fault. If the issues were such as required the plaintiff to show she was without fault,

the silence of the jury in this regard would be fatal to the plaintiff, for it would be equivalent to a finding that plaintiff was not without fault. In *Brazil Coal Company v. Hoodnut*, 129 Ind., 327, the court said:

"A special verdict should contain a finding by the jury upon every material fact in issue, necessary to state plaintiff's cause of action, upon which there was evidence, and a failure to find any material fact in issue is equivalent to a finding against the party upon whom rests the burden of proof to establish such facts."

It is urged that plaintiff must make this issue, upon authority of *Mad River Railroad Company v. Barber*, 5 O. S., 541. The rule, however, that requires plaintiff to make this issue in the case of master and servant, does not apply to the case under consideration, as immaturity is set out in the petition (*Rigoliet v. The Dayton Screw Company*, 1 Term, 79; *Rolling Mill v. Corrigan*, 46 O. S., 283). And as contributory negligence was not set up as an affirmative defense, a finding by the jury that plaintiff was without fault was not necessary.

As to the first objection: Attention is drawn to finding No. 4, which was as follows: "The guard to prevent the hand of the operator from getting into the rollers was not what ordinary and reasonable prudence would require." Finding No. 5 was as follows: This (the injury) probably would not have happened had the guard been a proper one." The word "probably" in accordance with our Supreme Court may be eliminated and the sentence read as though the word "probably" had not been there.

Defendant claims that these findings in particular are mere conclusions of law and not findings of fact. That, for example, it was the duty of the jury to find specifically from the evidence the various facts as to the guard, viz., its location, height and size, so that the court might determine whether or not the guard was a proper one. Section 5200, Revised Statutes, requires the jury to find the facts as established by the evidence, and not the evidence to prove the facts. It seems to us that if

1906.]

Ginn v. Mirick et al.

the jury had reported the various details as to the guard, that this would have been contrary to the plain meaning of the section just quoted (see, also, *Leach v. Church*, 10 O. S., 148; *Clark v. Halberstadt*, 1 Miles, 26; *Schweinfurth v. Railway Company*, 60 O. S., 215, 232, 233), and would have amounted to a finding on probative facts merely. In *Whitworth v. Ballard*, 56 Ind., 279, where, after dissolution of a firm, one partner endorses a note, and a special verdict found *ratification* of the endorser of the co-partner, it was held sufficient, *without setting forth the facts constituting the ratification*. In *Beasley v. Phillips*, 20 Ind. App., 182, 192, the court said:

“It is not necessary for the jury to find evidentiary facts by which a party was constituted *agent*; it was sufficient to find the ultimate fact.”

In *Divine v. U. S. Mortgage Company of Scotland*, 48 S. W., 585, Syllabus 2, where in a special verdict a person was found to be the *principal* on a note, it was not objectionable as being a conclusion of law. It is likewise significant as bearing upon the position now taken by counsel in urging a finding that the guard was not a proper guard as a conclusion of law, that the draft verdict submitted by him (see defendant's finding No. 6 unanswered) concludes with the words “and was a proper guard.” When the jury found that the guard was not a proper guard, and that the injury would not have occurred if the guard had been a proper one, it found essential elements and determinative facts as to the negligence complained of. The finding further shows the direct connection between said negligent act and the injury complained of. If finding No. 4 were to be excluded as a conclusion of law, and, therefore, disregarded as being mere surplusage, we think finding No. 5 would still be sufficient for plaintiff's purpose, and while there is no direct finding “*in haec verba*” that the machine was *dangerous*, finding No. 3 (plaintiff's draft) distinctly finds the operation of the machine was attended with risk, with regard to which plaintiff was not warned or cautioned. While it is true, nothing is to be *intended* in aid of a special verdict, still a finding that the

operation of a machine was attended with risk, was tantamount to finding the machine dangerous; obviously, when a thing is risky it is dangerous (Century Dictionary). It is true, the jury failed to find that the guard was not such a guard as in general use by laundrymen, but had they found upon this point, the finding would still, in our judgment, have been a finding on a probative fact, the evidence in regard to which was no doubt considered by the jury before it concluded that the guard was an improper guard.

The gravamen of the petition was the failure to have a dangerous machine guarded, and failure to instruct an immature person in the handling of the machine. These determinative and ultimate facts the jury found. It was not necessary that the jury state the various mental processes by which they arrived at the fact that the guard was not a proper one; nor was it necessary for them to detail the steps they took to reach any finding. *Schweinfurth v. Railroad Company*, 60 O. S., 232; *Railroad Company v. Dunleavy*, 129 Ill., 132, 145.

The petition stated a good cause of action, and we hold that the special verdict, read as a whole, including the findings on youthfulness and inexperience, and the failure to caution and instruct, responds to every material averment set forth in the petition, controverted by the answer, and is sufficient whereon to predicate a judgment for plaintiff. The motion for judgment on behalf of defendant must therefore be overruled, and the motion for judgment on the verdict on behalf of the plaintiff be granted. Judgment accordingly.

Bates & Meyer, for plaintiff.

W. A. Hicks, C. L. Hopping, for defendants.

1906].

Jackson et al v. City of Washington.

ELECTION UNDER THE BEAL LAW.

[Probate Court of Fayette County.]

GEORGE JACKSON ET AL V. CITY OF WASHINGTON.

Decided, July 29, 1905.

Liquor Laws—Contest of Election under Beal Law—Liquor Sellers not Entitled to be made Parties—Voters must Vote in Their Own Precincts—Residence of Inmates of Infirmary—Use of the Carbon Ballot—Gross Frauds at the Polls.

1. The interest of liquor sellers in the result of a Beal Law election is not of such a character as to entitle them to be made parties to a suit contesting an election which resulted on the face of the returns in favor of the sale of intoxicating liquors as a beverage.
2. The fact that an election under the Beal Law is general, the result affecting the entire community alike, does not furnish warrant for the casting of his ballot by a voter in some other ward than the one in which he resides, and a ballot so cast is an illegal ballot.
3. Paupers living in an infirmary can not be regarded as residing there temporarily, but the precinct in which the infirmary is located is the precinct of their residence.
4. The use of the carbon ballot, in the manner in which it was used in the election involved in this case, is an open violation of law, divulges the secrecy of the ballot, makes effective the use of money at elections, and opens the door for the grossest fraud.
5. The testimony discloses that sixty-two illegal votes were cast at the Beal Law election, held in Washington, C. H., March 30, 1905, and deducting this number from the total vote returned as in favor of the sale of intoxicating liquors as a beverage, gives a majority of fourteen against the sale, and the decree of the court is in accordance with this finding.

ZIMMERMAN, J.

This is a proceeding to contest a special election held in the City of Washington, Fayette county, Ohio, on March 30, 1905, under what is known as the Beal Municipal Local Option Law, and is in the court on petition of George Jackson, J. W. Willis, H. B. Brownell and J. C. Dunn, plaintiffs, against the City of Washington, defendant, filed April 8, 1905.

* Affirmed by the Common Pleas Court.

And thereupon the defendant, the City of Washington, filed a motion, duly verified, to certify the matters and proceedings involved in said petition to the court of Common Pleas of Fayette County, Ohio, alleging therein several grounds to the effect that this court was prejudiced and biased against the contestees.

The petition was filed in this court under an act commonly known as the Beal Law (95 O. L., page 87). Section 4364-20i of this act provides that the contest of elections held under this law shall be by petition filed in the probate court.

Therefore it appears that the probate court is the only court having jurisdiction in this matter, and to have allowed the motion to prevail would have deprived these petitioners of the right of contest.

The defendant made application to make certain parties defendant who are engaged in the retail liquor business in this city, alleging that their interests are affected by these proceedings.

The Beal Law (95 O. L., 87) direct that the probate judge upon the filing of the petition shall forthwith issue a summons, addressed to the mayor of the city, notifying him of the filing of such petition, and it is not the intent and spirit of this act to make any other parties defendant. The application was not allowed.

The plaintiffs in their petition claim:

“That in accordance with the order made by said council of said city, an alleged and pretended election was held on the 30th day of March, 1905, in said City of Washington, under said laws of Ohio, to determine by ballot, whether the sale of intoxicating liquors as a beverage should be prohibited within the limits of said municipal corporation; that the alleged result of said election as certified by the judges and clerks thereof, and by the said clerk of said council, was: Whole number of votes for the sale of intoxicating liquors as a beverage, 857; whole number of votes against the sale of intoxicating liquors as a beverage, 809; giving a majority of 48 upon the returns of said judges and clerks of said election in favor of the sale of intoxicating liquors as a beverage.”

The petitioners state:

“That at the time of such election and for more than a year prior thereto, there was published in said city of Washington,

1906.]

Jackson et al v. City of Washington.

two newspapers of opposite politics, of general circulation in said city, there being a Democratic paper known as the *Ohio State Register*, and three Republican papers published in said city, all of which papers were of general circulation in said city among members of the respective political parties; that said mayor of said city caused the proclamation and notice of said election to be published in one Republican newspaper published in said city and in no other paper published in said city."

The defendant demurred and also moved that the same be stricken out.

The object and intent of the Legislature in requiring that publication be made in two papers of opposite politics in such cases is that all the electors of such a municipality may be given due notice of the pending election; and all may have the right to exercise a ballot for or against such a proposition; and such a right should be protected so that all the electors may be made aware of the questions that are to affect their rights and privileges.

It was shown by the poll books and tally sheets that there were 44 more votes cast at the election held on the 30th day of March, 1905, than were cast in this city at the Presidential election of 1904, and as all the electors of this city must, therefore have had knowledge of the election, the object and purpose of the law was fulfilled, and the demurrer was sustained. (Citing 15 Ohio State, 532; 4 C. C.—N. S., 81).

It is further claimed by the contestors:

"That there were cast at said election 1666 votes; that this number of votes certified by the judges and clerks of said election and the clerk of the council of said city, including one hundred and more votes cast by persons who were not qualified electors of the City of Washington on the day of said election, and that said persons in casting said votes, were not legal and qualified electors of said city on said day, yet voted for the sale of intoxicating liquors as a beverage, and that their said votes were counted by the judges and clerks of said election, and certified as aforesaid; that had it not been for the casting of said illegal votes by said persons, who were not qualified electors of said city, and the counting and certifying of the same, that the majority of legal votes cast and certified as a result of said election would have been against the sale of intoxicating liquors as a beverage in said city."

To all of which the defendant demurred and also moved that the same be stricken out. The demurrer was overruled and the motion to strike out denied.

The plaintiffs further claim in their petition:

“That of the 857 votes cast at said election for the sale of intoxicating liquors as a beverage in said City of Washington, and certified as aforesaid, a large portion thereof, being more than one hundred in number, were cast by electors and persons in said city who were then and there induced to, and did vote for the sale of intoxicating liquors, by means of bribery practiced by certain other electors in said city, who then and there, in order to procure a majority of the votes cast at such election to appear in favor of the sale of intoxicating liquors, hired, employed, promised money and other reward, and paid money to said one hundred and more voters, and to each of them, and said voters and each of them then and there received said hire, employment, promise of money and other reward, and on account thereof, did then and there severally vote in favor of the sale of intoxicating liquors as a beverage at such election; and that because of said bribery, and said fraudulent, illegal and corrupting influences aforesaid, of procuring said votes to be cast as aforesaid, and the casting of the same in manner and form aforesaid, and the counting of said illegal votes by said counted in favor of the sale of intoxicating liquors as a beverage, whereas, had it not been for said bribery, and said fraudulent means in procuring said voters to cast their votes in manner and form aforesaid, and the counting of said illegal votes by said judges and clerks, the votes so certified against the sale of intoxicating liquors as a beverage in said city would have exceeded those certified as in favor of said sale of intoxicating liquors by more than one hundred votes.”

The defendant demurred to this clause of plaintiff's petition, and also moved the court to strike out the same. The demurrer was overruled and the motion denied

The plaintiffs also further claimed:

“That a large number of electors in said city, the names of many of whom are unknown to the plaintiffs, and many of whom were interested in the saloon business carried on in said city, prior to and upon the day of said election, combined together and formed an organization for the purposes of corrupting, bribing and influencing votes of other electors of said city, and for the purpose of procuring persons who were not qualified

1905.]

Jackson et al v. City of Washington.

electors of said city to vote at such election, and for the purpose of preventing a fair and honest election upon the question of the sale or the prohibition thereof of intoxicating liquors in said city as a beverage, and for the purpose, by such corrupt, fraudulent and unlawful methods, of making it appear that a majority of the votes cast at such election were for the sale of intoxicating liquors as a beverage in said city, did then and there and thereby at such time and for such purposes, procure a large number of persons, the exact number of whom are unknown to plaintiffs, who were not qualified electors of said city to vote at such election in favor of the sale of intoxicating liquors as a beverage, in said city; and did then and there and thereby, for such purposes by means of bribery, hire, employment, and the giving of money to voters to influence their votes, induce and procure a large number of electors in said city, the exact number of whom are unknown to plaintiffs, to cast their votes in favor of the sale of intoxicating liquors as a beverage in said city; and that by reason of all the premises aforesaid, a large number of persons, who were not qualified electors in said city, did then and there at such election, vote in favor of the sale of intoxicating liquors as a beverage in said city, because of the bribery, hire, employment, payment of money and corrupting influences aforesaid, and were thereby induced to and did at such election, accept said bribes, hire, employment and payment of money, and on account thereof did vote for the sale of intoxicating liquors as a beverage in said city; that the exact number of persons so illegally voting as aforesaid is unknown to these petitioners, but plaintiffs aver that if it had not been for the procuring of said illegal votes to be cast in the manner and form aforesaid, there would have voted against the sale of intoxicating liquors as a beverage in said city, a number thereof sufficient to make a majority at such election against the sale of such liquors as aforesaid; that the majority of votes cast at such election would have been in favor of the prohibition of the sale of intoxicating liquors as a beverage in said city; that said combination of electors aforesaid to further corrupt and defeat the will of the voters at such election, procured a device to be used by the voters consisting of a blank ballot and a sheet of carbon paper of the same size and form of said ballot, which was inserted in an envelope and sealed up and said envelope was so marked as to enable the electors to use the same in connection with the marking of the official ballot in the election booth, in such manner that he could convey the information as to how he voted, by returning said envelope, blank ballot and carbon to the party from whom he had received the same, showing by said blank ballot that

he voted in favor of the sale of intoxicating liquors as a beverage.

"Said device so above described, was at such election delivered to and used by a great number of the electors so voting at said election, to-wit, more than two hundred thereof, and that said electors so using said device were each to and did receive a money consideration for their votes so cast, upon the return of said device to the aforesaid combination of electors, which showed by the carbon mark upon said blank ballot that each of said votes were cast in favor of the sale of said intoxicating liquors as a beverage in said city; that by reason of said fraudulent device so used by said combination of electors, the secrecy of the ballot was destroyed, the will of a majority of the legal voters was defeated, and said election thereby rendered fraudulent and void."

The defendant demurred to this clause of the petition, and moved to strike out the same. The demurrer was overruled and motion denied.

The defendant then filed a general denial to the petition.

Many questions have arisen in the course of the trial, which consumed several weeks, and the calling of many witnesses, and the court will pass upon the questions which seem to be of the most importance.

Section 1, Article V of the Constitution of Ohio provides that:

"Every white male citizen of the United States of the age of twenty-one years who shall have been a resident of the state one year next preceding the election, and of the county, township or ward in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

The Legislature, by the power conferred upon it by the Constitution, enacted Section 2945, which provides that:

"No person shall be permitted to vote at any election unless he shall have been a resident of the state for one year, resident of the county for thirty days and resident of the township, village or ward of a city or village for twenty days next preceding the election at which he offers to vote, except where he is the head of a family, and has resided in the state and in the county in which said township, village or ward of a city or village is situate, the length of time required to entitle a person to vote under

1906.]

Jackson et al v. City of Washington.

the provisions of this title, and shall bona fide remove with his family from one ward to any other ward in such city or village, or from a ward of such city or village to a township or village in the same county, or from a township or village to a ward of a city or village, in the same county, or from one township to another in the same county; in such cases, such persons shall have the right to vote in such township, village or ward of a city or village, without having resided therein the length of time above described to entitle a person to vote; provided, that such voter so removing with his family from a township to a village or ward of city or village, in the same county, shall not have the right to vote at any municipal election, held in such city or village, unless he shall have resided therein twenty days prior to such municipal election."

In the trial of this case, the testimony disclosed the fact that voters who lived in one ward voted in another than the ward in which they lived; others who lived in the township and voted in the township at previous elections, moved in the city a few days prior to the election—less than twenty days—voted in the election held in this city, and immediately following said election, moved back to their former homes in the township.

In the case of the voter who lived in one ward and voted in another ward than the one in which he resided, the contestors claim is an illegal vote; on the other hand the contestee claims as this election was submitted to the electors on a proposition, it was not such an election as an election for candidates for office, but one of general effect, and that the electors of the city had a right to vote in any ward of the city, and were not confined to the wards in which they lived.

From the position taken by the contestees it would not be necessary to have a city, on a proposition of this kind, divided into wards only for the purpose of the convenience of the voter. Under such a loose construction of the statutes, the door would be open for fraud of all kinds. A voter is much more likely to be acquainted with the electors of his own ward, than the electors of the entire city.

The strict construction of Section 2945, as above cited, is that "no person shall be permitted to vote at any election unless he shall have been a resident of the ward or city or village for twen-

ty days next preceding the election at which he offers to vote;" and before an elector can vote in a ward, he must be a resident of that ward at least twenty days preceding the election, except in cases where an elector is the head of a family, and moves in the ward in which he votes.

Those who live in the township and move into the city less than twenty days preceding the election, and voted in the election are not residents of the ward, and are illegal voters. (R. S., Sec. 2945.)

Before a person can be a legal voter he must reside in the state one year, county thirty days, township twenty days, ward of a city twenty days, and twenty days within a village or precinct.

The evidence in this case disclosed the fact that many persons who voted here on March 30, 1905, had heretofore been residents of this city, and had voted here in previous elections and no questions were raised as to their residence. Afterwards many of these voters moved with their families, household goods and effects from the city, previous to this election.

In moving they left no place of residence to return to in this city, vacating their former homes, the same afterwards being occupied by others, leaving no household goods or effects of any kind here to indicate that they ever intended to return here again to live or to make this city their home.

The evidence further shows that others who had moved away from here with their families and effects, prior to the election of March 30, 1905, and who had voted at elections held elsewhere, in the meantime, returned to this city on the day of the election, or a few days before, without regaining their residence and voted here on March 30, 1905.

It was proven that others who voted here at the Beal Law election and were former residents of this city, had purchased homes in other cities, had moved there with their families and effects, and were living there on March 30, 1905..

There was testimony tending to show that there were others who had lived here, some of whom were heads of families, and others unmarried, who were provided with money and transportation by parties who were in favor of the sale of intoxicat-

1905.]

Jackson et al v. City of Washington.

ing liquors to return here to vote at the Beal Law election held here on March 30, 1905.

The poll books and tally sheets were used in evidence, showing names of voters appearing thereon who voted here, who were unknown and could not be found by subpoenas placed in the hands of the sheriff, who testified that he had made diligent search and inquiry, but was unable to find them, and his returns show, "not found."

Several citizens of this city testified that they knew most of the voters of their respective wards, and that they had made search, but were unable to locate any place of residence in this city, by inquiry of others, or by means of their own knowledge of various unknown parties who voted here on March 30, 1905.

The plaintiffs introduced testimony showing that names appearing on the poll books and tally sheets of the election of March 30, 1905, of persons who voted here on that day, included names of minors, and introduced the birth records of the probate court and school records of this city, showing the age of such voters; they also showed by said voters that they voted here on that day, and the records showed conclusively that the persons so voting were not twenty-one years old when they voted on March 30, 1905.

The contestee contended, and in several instances proved, that some of the numerous voters mentioned above were legal residents of this city and were away temporarily only, their intention being to return to this city, and that they had not abandoned their homes here.

It was claimed by plaintiffs that there were others who were unmarried, living outside of this city, but were residents of this county, who voted here, and that such voters had no legal residence in this city.

The contestee contended that these persons were only away temporarily, and that their intentions were to return to this city to live, but they were unable to show that these voters had any occupation or place of residence whatever in this city on March 30, 1905.

The question of residence is a very peculiar one, and one that must be determined by the acts and intentions of the party

himself; it can not be taken from inference, but must be determined solely from the facts.

The residence of a married man is governed by the place of residence of his family, and the place where they reside must be his residence. The mere temporary absence of his family does not change his residence.

The law governing the residence of an unmarried man is different, the latter having no family or home, except the home of his parents or his rooming or boarding place.

In the cases herein cited it was shown that no such facts existed; these voters had no lodging place or boarding place in this city on the day of the election, March 30, 1905.

Considerable time of this trial was taken up by testimony showing that fraud and bribery had been committed by the parties who were in favor of the side of the proposition "for the sale of intoxicating liquors as a beverage." The testimony covered many different methods and means of procuring illegal votes in favor of the sale of intoxicating liquors.

The contestors claim that on the day of the election, beginning early in the morning and continuing most of the day, the parties favoring the sale of intoxicating liquors were using closed cabs for the purpose of taking the voters to the voting precincts, and in said cabs, with drawn curtains, protected from the public gaze, then and there did corrupt the voter with the promise of the payment of money to influence the elector to cast his vote for the sale of intoxicating liquors as a beverage.

The testimony tended to show that the occupants of these cabs were parties who were working on the side of the proposition "for the sale of intoxicating liquors as a beverage," and that these cabs were hired and paid for by the friends of that side. It was also claimed by the contestors that the cabs were driven to the election precinct, where they took in parties off of the streets and would take them a short drive, bring them back to the voting precinct and let them out to go in to vote. After voting the voter would get in the cab again and be driven away.

The testimony of witnesses who occupied the cabs showed that they had been given envelopes marked with an X mark with red

1905.]

Jackson et al v. City of Washington.

pencil on the lower left hand corner, and had been instructed that when they entered the booth they were to place the official ballot handed him by the election officer on the envelope and then make a cross on the ballot over the cross on the envelope. Marking the ballot in this way had the effect of making a corresponding X mark on the carbon ballot enclosed in the envelope. The envelope was thereupon returned by the voter to the occupant of the cab, that the latter might determine whether or not the purchased vote had been cast as directed.

The voter was then given two cards and a half card and directed to go to a certain place and there receive the sum of \$2.50 for so voting.

It was also shown by the testimony that other voters were approached on the streets by certain parties and asked to vote for the sale of intoxicating liquors, being assured that they would receive for doing so the sum of \$2.50, and it was shown that these voters were directed to go to a certain place in an alley and drop the tickets into a device similar to a slot, and there would roll down before them \$2.50 in money.

The party cashing these cards was concealed behind a screen and was not seen by the vote seller.

It was shown by one witness who was working on the telephone cable above and near the Fourth ward poll that from his position he looked down over the curtain in the cab and could see the occupant of the cab pay money to many voters, and that a large roll of money was in evidence and in possession of the occupant of the cab, who was shown to be working in the interest of the proposition "for the sale of intoxicating liquors as a beverage."

The evidence shows that there were places to which voters were directed to go to arrange for voting and to receive money after they had voted. These places were in upstairs rooms, stables and alleys. They attracted unusual attention and were repeatedly broken up by the parties who were working "against the sale of intoxicating liquors as a beverage."

The testimony further discloses the fact that certain officers of the election on March 30, 1905, took from certain voters while in the election booths nine sealed envelopes found in the hands

of said voters, who were caught using the envelopes in marking their official ballots. These envelopes were introduced in evidence and opened by the order of the court. They were found to contain carbon sheets and blank ballots, most of which were marked similarly to the official ballots used on that day, indicating clearly by the position of the X mark how the elector had voted.

There was other testimony tending to show that other parties were approached and offered money to vote for the sale of intoxicating liquors by persons who were working in favor of that side. It was proved that two voters who voted on March 30, 1905, were inmates of the county infirmary and had been for some time, and that one of them admitted that he had received money for his vote. The contestee contended that these parties were remaining at the infirmary only temporarily, and that their real residences were here in this city.

"The residence of a pauper at a poor house is the precinct in which the poor house is located." (*Lemoyne v. Farrell*, Smith, 406; *Stewart v. Kiser*, 105 California, 549).

The Legislature, to preserve the secrecy and purity of the ballot, enacted the law known as the Australian Ballot Law (R. S., 4536; B. 2966-37) and the law has the following provisions:

"Before leaving the voting shelf the elector shall fold his ballot without displaying the marks thereon, and so as to conceal the same, but show the endorsements and *fac simile* of the signatures of the proper clerk or board, and keep the same so folded until he has delivered the ballot to the presiding officer."

The chief reason for the general adoption of the ballot in this country is that it affords the voter the means of preserving the secrecy of his vote, thus enabling him to vote independently and freely without being subject to be overawed, intimidated or in any manner controlled by others, and protect him from any ill will or persecution on account of his vote. The secret ballot is justly regarded as an important and valuable safeguard for the protection of the voter, and particularly the humble citizen, against the influence which wealth and station may be supposed to exercise. And it is for this reason that the privacy is held not to be limited to the moment of depositing the ballot, but is

1905.]

Jackson et al v. City of Washington.

sacredly guarded by the law for all time unless the voter himself shall voluntarily divulge it. (McCrary on Elections, Sec. 488.)

This government and its institutions are based upon the will of the people, expressed through the ballot box, and its prosperity will last so long as the ballot of the people is inviolate and the voters have the right of an honest ballot and a fair count, and any violation of that right conferred upon the people should be met with prompt punishment.

"All votes obtained by paying or agreeing to pay money or property or anything of value to electors therefor are to be rejected upon proper proof by the court or tribunal trying the case of contest. This rule rests upon principles of great public importance which are thus stated by the Supreme Court of Wisconsin in *State v. Olin*.

"In our form of government, where the administration of public affairs is regulated by the will of the people, or a majority of them, expressed through the ballot box, the free exercise of the elective franchise by the qualified voters is a matter of the highest importance. The safety and perpetuity of our institutions depend upon this. It is therefore particularly important that every voter should be free from any pecuniary influences. For this reason the attempt at bribery to influence an elector in giving his vote or ballot is made an indictable offense by statute.

"The payment or promise of money or other valuable consideration for the giving of a vote no doubt constitutes the offense of bribery or attempt to bribe within the meaning of the statute. Can a vote thus obtained in direct violation of the statute be considered a valid or legal vote? If it can, then the very object of the statute, which is that it shall not be so obtained, is defeated. We are of the opinion that such votes are illegal, and that the judge was right in directing the jury to disregard them." *State v. Olin*, 23 Wis., 327; *Cowan v. Prowse*, 93 Ky., 156; *McCrary on Elections*, Sec. 215).

"It has never been seriously doubted that a vote obtained by an offer to the voter direct of a pecuniary or other valuable consideration therefor, is a bad vote, and should be rejected." (McCrary on Elections, Sec. 216; 10 Iowa, 212; 56 Iowa, 397).

"Money paid or promised by a candidate to a voter for his day or traveling expenses in attending an election or a primary meeting and casting his vote for him, is illegal." (*Howard v. Jacoby*, 14 Lanc. Bar, 31.)

So the votes cast by certain men who came from Dayton and Hillsboro and voted here on March 30, 1905, their expenses of transportation being borne by others, are clearly illegal votes. The testimony clearly discloses the fact that their expenses were paid by parties who were working in the interest of the "sale of intoxicating liquors as a beverage."

It was shown by the testimony of quite a number of the citizens who are legal voters, that they did not vote on March 30, 1905, and the poll books and tally sheets show that 1666 votes were cast on March 30, 1905, while at the preceding November election for a national and state ticket, and which naturally called forth a full vote, there was but 1622 votes cast, thus making a majority in favor of the March election over the November election of 44 votes, which together with the many electors who testified that they did not vote at all on March 30, 1905, gives reasonable grounds for concluding that there were cast in this city the votes of many persons who were not legal voters, not being residents of this city on March 30, 1905. These men were interlopers and illegal voters, brought here by those who were working for "the sale of intoxicating liquors as a beverage" for the purpose of polluting and corrupting the ballot, by bribery and fraud and overriding the will of the voters and the honest citizens of this municipality.

The use of the carbon ballot outfit in connection with the official ballot is a new device for the purpose of ascertaining how the voter has marked his ballot and it is a new question that has not been passed upon by the courts of this state. It is readily seen if this pernicious practice of corrupting the ballot is permitted to continue, that the fundamental principles of the Australian system of voting, and with it the privacy of the ballot, will soon be destroyed.

The inception of the injury and the crime of the use of the carbon envelope and ballot works four-fold wrongs:

- 1st. It is open violation of the law.
- 2d. It divulges the secrecy of the ballot.
- 3d. It makes the use of money in elections effective, for it

1905]

Jackson et al v. City of Washington.

discloses the way of marking the ballot, and offers the proof to the vote purchaser.

4th. It opens the door for the grossest of fraud by the unscrupulous voter who barter away his right of suffrage for the paltry shekel.

The question arises, are not the votes of the electors who used the carbon outfit illegal? There is but one answer and solution to this question. The use of such a device is for the purpose of determining whether or not the elector who accepts the money voted as he sold himself to do.

It can not be construed in any other light than as a means of corrupting the vote, and is consequently illegal, and, therefore, all voters who used the envelope and carbon ballots are illegal voters.

In determining the number of illegal votes cast at the Beal Local Option election held on March 30, 1905, there should be included all votes tainted with the use of money, and votes cast by the carbon ballot users, the non-residents and the minors.

After a careful study of the many persons whose votes were in question, and after giving the benefit of any reasonable doubt in favor of the voter, the court finds that there were sixty-two illegal votes cast at the election held in his city, under the provisions of the Beal Local Option Law on March 30th, 1905, thus leaving a majority against the sale of intoxicating liquors as a beverage of fourteen votes.

Taking into consideration the vast amount of testimony tending to show the wholesale use of money for the corruption of the ballot and the use of the envelope with carbon sheet and blank ballot on the inside in the hands of many voters, this court is led to the strongest belief that there were other persons who voted in said election who were corrupted, but who were not detected in the act; also, that there were many places in this city where bargains were made for the purchase of votes and where many voters were afterwards taken and paid for their votes.

This buying and selling of votes was not confined to the upstairs rooms and hallways, and stables and alleys, and the dark places in them, but was carried on in cabs with closed doors

and in some instances with drawn curtains, in open day light, upon the public streets and in full view of the people.

The testimony in this case showed that this election was strongly impregnated with the odor of corruption, fraud and bribery, and that the side in favor of "the sale of intoxicating liquors as a beverage," was permeated and honey combed with the vilest of fraud that could be perpetrated upon the sacred rights of the people at the ballot box.

There was no testimony offered on behalf of contestees to show that the contestors or their friends had used any money for the purpose of purchasing votes or that they offered inducement of any kind as a corrupting means to influence electors to vote "against the sale of intoxicating liquors as a beverage."

To set this election aside as fraudulent and void and order another election in the face of such gross frauds committed by one side only, would not be fair in the face of the majority of fourteen found by the court in favor of the side "against the sale of intoxicating liquors as a beverage," and together with other evidence showing the grossest fraud in the use of the envelope and carbon ballots, bribery and other inducements and devices resorted to on election day, leads to the reasonable belief that there were a great many more voters corrupted and bribed than those discovered, and that instead of the majority of fourteen there would have been a much larger majority in favor of the side "against the sale of intoxicating liquors as a beverage," if the voters had been left to an honest and fair expression of their own free will, without the use of bribery and other devices to divert and destroy the free and honest expression of their will through the ballot.

It is, therefore, ordered that the proposition "against the sale of intoxicating liquors as a beverage" is entitled to and should be accredited with a majority of fourteen votes as a result of said Beal Local Option election held in the City of Washington on March 30, 1905.

The entry to show accordingly.

Mills Gardner, Post & Reid and H. H. Sanderson, for the contestants.

Humphrey Jones and Harper & Harper, for the contestees.

1905.]

MacBride v. Gould et al.

ALLEGED CONSPIRACY TO SECURE A DIVORCE.

[Common Pleas Court of Franklin County.]

JAMES T. MACBRIDE v. OREN B. GOULD ET AL.

Decided, September 19, 1905.

The Scintilla Rule—Its Decaying Vigor in Ohio—Duty of Court to Grant a Non-suit, When—Judicial Officers—Not liable in Damages in Civil Action—Notwithstanding Negligence or Corrupt Purpose—Where the Act is Within Their Jurisdiction—Divorce—Finding as to One Year's Residence—Will not be Inquired into, When—Injury from Conspiracy to Secure a Divorce—Discharge of one Defendant Does not Discharge All—What Constitutes Collusive Agreements to Secure a Divorce—Mouth of Injured Party Closed, When.

1. The scintilla rule of evidence has no longer its former force and vigor in Ohio, and where the probative value of plaintiff's evidence is so slight that a motion for a new trial would have to be granted if a verdict be based upon it, it is the duty of the court to grant a motion to non-suit, or to direct a verdict for defendant at the conclusion of plaintiff's evidence.
2. Judicial officers, such as a common pleas judge, can not be held in damages in a civil action for any judicial act, finding, judgment, order or decree made upon a subject-matter within the jurisdiction of such court. And the reason and policy of the rule apply with equal force against the maintenance of any such action, alleging the act to have been negligently or corruptly done.
3. While such judicial officer may be held liable for acts outside his jurisdiction, this does not mean jurisdiction dependent upon the existence of facts to be determined by such judge from evidence adduced, but jurisdiction as a matter of law. Therefore a finding of fact by a judge that the evidence established one year's residence of the plaintiff in Ohio, in divorce trial, will not be inquired into or disturbed in an action against such judge, on the ground that such finding was erroneous and therefore no right or jurisdiction existed to grant the divorce.
4. As the injury done, and not the conspiracy, is the gravamen of the offense in civil actions for conspiracy, the action will warrant a verdict against any one or more of the defendants. The discharge of one or more defendants will not discharge all, unless the injury could only have been inflicted by a joint act and mutual co-operation of certain defendants, in which case the discharge of one necessary to such joint action, of necessity, discharges all.

5. A husband, who by written agreement, receives \$4,000 from his wife, and agrees that she may take the children, leave and obtain a divorce at her pleasure, can not maintain an action against those whom he charges with carrying out said agreement and procuring such divorce.
6. A collusive agreement with reference to divorce is one by which the parties agree to obtain a divorce either by suppression of the facts, or by manufactured or false evidence. Where an agreement only provides that one party will not contest, it is not collusive, but calls for a closer scrutiny by the court of all the facts, and leaves it a matter for the court to consider in connection with all the evidence adduced.

DILLON, J.

Omitting the inducement contained in this petition, the substance of the complaint here is that the wife of this plaintiff was induced to leave and abandon him, together with his two minor children, and that in connection therewith a divorce case was instituted by her against him; in which case the two attorneys for his wife, his own two attorneys who represented him in that case, the common pleas judge who sat upon the bench and heard the case and the two brothers of his wife, making seven persons in all, conspired and agreed together that they would alienate her affections, separate them by judicial decree, deprive him of the society of his wife and his children and whatever pecuniary interest he may have had by way of dower in her property, and that by this agreement of these seven persons this was accomplished, and a pretended hearing was had before the common pleas judge and a fraudulent judgment and decree rendered against him.

In a case of this kind where a layman comes into court and makes charges which affect four lawyers, practitioners at the bar and officers of the court, and also affecting a judge of the court of common pleas, it is the duty of the court to lend a most listening ear to every part of such complaint. It is the duty of the court, as I conceive it, to give, if possible, a stricter attention and circumspection to every act, in order that it may never be said by the people of this commonwealth that any leniency whatever will be extended by the court to its own officers, or to its associates, that the fountains of justice may,

1905.]

MacBride v Gould et al.

in the minds of the people, be known to be pure. Therefore in this case it has been my special duty to give particular attention to each bit of evidence that has been adduced here, in order that it may be known to the people of this state and to the bar of this state, that a complaint of this kind shall be fully heard, rigidly investigated, and so far as the fallibility of human judgment permits, determined righteously.

At the conclusion of the plaintiff's testimony in this case a motion has been filed asking the court to direct a verdict of the jury for each and all of the defendants, and this, of course, tests the sufficiency of the evidence which has been adduced.

I will first very briefly discuss the liability of the judicial officer. In cases of this kind the principle is well settled, both by authority and by reason, that no civil action can be maintained against a judicial officer for the recovery of damages by one claiming to have been injured by his judicial action within his jurisdiction. From the very nature of the case, the officer is called upon, by law, to exercise his judgment in all matters before him, and the law holds his duty to the individual to be performed when he has exercised it, however erroneous or disastrous in its consequence it may appear to be, either to the party or to others. When a judge does as he deems just between particular individuals, who may have a controversy, this is not considered to be the end and sole object of his judicial act; that is to say, the sole object, purpose and end are not simply to settle rights of individuals. There is still a higher object to be attained, and that is the duty which the officer owes to the public. Justice is to be meted out, to the end that peace and order may prevail in political society and in the commonwealth in which we all live. This duty is a public duty and the end to be accomplished is, therefore, largely for the public welfare. Individual advantage or loss may result from a proper and thorough, or an improper or imperfect, performance of duty. The judge performs his duty to the public by doing justice between individuals. Or if he fails to do justice as between individuals, he may be called to account by the state in such form and before such tribunal as the law may have provided. It

may, at first consideration, impress one that if a judicial officer, however, should corruptly and maliciously do violence to his oath of office, and, therefore, render a wrong or injury to another, that such case would be taken to be without this rule; but the immunity of judicial officers from civil liability is not affected by the motives with which they are alleged to have performed their duty.

The statement of Mr. Justice Field, in the case of *Bradley v. Fisher*, 13 Wall., 335—speaking now for the Supreme Court of the United States—has been often quoted. I find it quoted very frequently in different cases and it may not be amiss to quote it here:

“Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything by the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

1905.]

MacBride v. Gould et al.

“If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.”

The exception, therefore, to this rule exists only in those cases where the judge acts without jurisdiction, for the judge in such case would be a mere trespasser and he is disrobed of his cloak of protection. He is acting where he has no right to act and as a mere individual. In such cases a judge may be held liable.

In this case, it is claimed that Judge Middleton did not have jurisdiction and, therefore, he may be held liable as a matter of law. I think this is founded upon a misconception of what is meant by jurisdiction. Jurisdiction by virtue of law is one thing and jurisdiction by virtue of the existence of certain essential facts is another thing. In this case, as a matter of law, the defendant in this case, Judge Middleton, had jurisdiction. That is to say, he had jurisdiction of the subject-matter, it being his particular, sole and exclusive province to hear divorce cases, and he also had jurisdiction of the parties by reason of the fact that each party was before the court. It is required by statute that a divorce shall not be granted to any person unless that person has resided for one year in this state. Unless the judge therefore finds, as a matter of fact, that that is true, he will have no right to pass upon the merits of the divorce case, however aggravated a case may be presented. But whose duty is it to pass upon that question of fact? That of the common pleas judge hearing the case; and having heard the evidence, it becomes solely and exclusively a part of his discretion to determine whether or not the facts presented establish that the

plaintiff did have a residence of one year in the state of Ohio. If, as a matter of fact, from all of the evidence adduced, the circuit court or any other appellate court should be of a different opinion, nevertheless, they are without jurisdiction to reverse that particular finding of the judge, and if it were a case which they might review, the rule of liability would be the same. Therefore, the common pleas court had the right, and it was within its discretion, to determine from the evidence adduced whether or not, as a matter of fact, from all of the facts presented, the plaintiff had a residence in this state. The same is true with reference to what degree and to what extent the trial court in such cases will require corroborative proof. It is within the discretion of the judge. The statute is directory. It is the duty of the judge in each particular case to exercise discretion. It is not unfrequently the case—especially in the smaller communities—where the judge has a personal acquaintance with the parties to the divorce suit, to say to the attorneys: “I have known the plaintiff in this case so many years and you need not bring any more witnesses to show the good character of the plaintiff.” On the other hand I know in my own experience—and it is probably true with other judges—where three or four witnesses have come forward and testified to the good character of the party, but the judge personally knows the character of the party to be vicious and bad, and has refused a divorce, thus exercising that discretion and judgment to which I have referred, not depending upon the testimony at all, but disregarding it.

It follows from the view entertained upon this subject, that the contention of counsel by Judge Middleton that he ought not be held in this case, is right. But he has seen fit of his own volition for the good of society, as well as for his own character and reputation, to submit to this investigation, and asks for the opinion of this court upon the evidence that may be adduced against him.

As to Judge Middleton, perhaps it is a mere voluntary act on the part of this court, and yet I think it requires very little explanation from me in announcing that the evidence adduced

1905.]

MacBride v. Gould et al.

in this case has not, in any degree whatever, connected him with any of these charges made in the petition; that is to say, there is not a scintilla of evidence, and if inference to the opposite effect might be drawn from the evidence adduced here, then no judicial officer is safe in deciding any case either for the plaintiff or for the defendant, unless the counsel and parties in the case agree with the court in its decision. As a matter of law, therefore, for the two reasons given, I must sustain the motion in behalf of Judge Middleton.

The question then arises as to whether or not the contention of defendant's counsel is correct that all of the other six defendants must likewise be discharged for that reason only. In civil cases, as distinguished from criminal cases, where conspiracy is charged, the gravamen of the offense is not the conspiracy, but the actual injury done.

I read from the 6th American & English Encyclopædia of law, at page 872:

"Conspiracy in its civil aspect, considered as the ground of an action on the case for damages, partakes of none of the distinguishing characteristics of the criminal offense.

"And a civil action for damages, it has been held, suffered by reason of a conspiracy, might be instituted against a single defendant, or if brought against several, a verdict against one and in favor of the others would not necessarily be improper.

"It would seem, however, even in the case of the civil action, that where the defendants are charged with having done the plaintiff an injury which could only have been inflicted by the joint action and mutual co-operation of the defendants, the proof must implicate all, or enough to have done the injury charged."

I conceive it possible, therefore, that even with the common pleas judge out of this case, the plaintiff might make a case against the other six or a less number, and therefore, for that reason alone I do not feel disposed in dismissing these defendants.

Coming now to the case as made against the other six defendants, it is admitted that sometime prior to the institution of this divorce proceeding, to-wit, on November 6, 1903, a

written agreement was made between the plaintiff in this case and his wife. The substance of this agreement is that they separate from each other. She agreed to relieve him of all responsibility as head of the house, for any expenses for maintenance of the children. He agreed to give her the exclusive control and possession of the children. She agreed to give him \$4,000 in settlement of their property relations, and finally they both agreed that she should get a divorce and he would not oppose it. Some three or four months later she actually instituted the case for divorce which is the basis of this action. He says on his part that he was not in earnest; that this agreement was entered into by him for the purpose of using it at any time he might see fit to prevent her from getting a divorce, being advised it would be preventive of that action. That she believed it and acted upon it there is no question. That both of them fulfilled it, so far as her paying him the \$4,000 is concerned, and relieving him from any further expenses, and giving her the custody of the children, and further, that they both carried it out to the extent of separating, there is no dispute.

There has been some misconception here as to the extent of taint in this agreement. This agreement is valid as to the custody of these children. It is valid as to the alimony feature of it. It is valid as to their agreement to separate from each other. It is valid so far as the two parties themselves are concerned—as to her agreement to support the children and relieve him from that duty.

What is a collusive agreement? I read from Stewart on Marriage and Divorce, Section 302, which gives a very terse and apt illustration:

“Collusion is the parties’ agreement to make up a case for the purpose of obtaining a divorce. Collusion may be active, as where one of the parties agrees with the other that he will commit the act complained of to give her a cause for divorce, or passive, as where the understanding is that the defendant shall suppress facts which might constitute a good defense.”

I might add to that definition, it would also be collusive where the parties agreed to manufacture false testimony. None of

1906.]

MacBride v. Gould et al.

these three elements—the two given by Stewart or the one I have added—are embraced in this contract. The only part of this contract, therefore, which may be considered as a nullity is that part where they agreed with reference to a divorce. The courts ignore that and treat it as a nullity. It is not an offense against the law. It is an agreement which ignorant people often make. They are not punishable for it, but the law will not enforce it. And further than that, the court, upon notice of such an agreement for divorce, will scan all the more closely the testimony offered and may exercise the discretion in a punitive way, and therefore as a preventive measure by refusing a decree.

I will briefly quote from the 9th American & English Encyclopaedia of Law, at page 832:

“Collusion is a conspiracy of the husband and wife to obtain a divorce by suppression of the facts or by false or manufactured testimony.”

Reading from page 833:

“But a case for divorce will not be dismissed, however, where one of the parties discloses all the facts to the court and contests the case in good faith.”

That is to say, where a person had unlawfully and almost corruptly, we will say, agreed to suppress testimony or to manufacture testimony, comes into court and shows an agreement to the court and explains it and then presents a meretorious case, the court will not necessarily, as a punitive and preventive measure, refuse a decree for divorce. If any other doctrine should be maintained it would simply follow that two parties who would make a collusive agreement for divorce would forever afterwards be precluded from getting a divorce, however much one or the other may have been entitled to it.

In the case at bar, that part of the agreement presenting the infirmity reads as follows:

“The object of this agreement is solely for the purpose of amicably obtaining a divorce and continuing our friendly regard.”

So far there is no suppression of the facts or manufacture of new evidence. There is no agreement to suppress facts. The effect of such an agreement as this, therefore, is as I see it, that the court might in its discretion as a punitive measure refuse or more likely it might scan more carefully and give the strictest circumspection to all of the testimony adduced, especially if the defendant himself should not appear.

The next point I wish to pass upon is whether or not the plaintiff himself agreed to that separation. That he made his wife believe it was thoroughly established in this case. In fact, it is not disputed that he did everything under that agreement himself as therein provided. His appearance at the divorce case is not disputed. If it be that he did agree to this contract and acted under it, it would necessarily follow, as a matter of law, that he could not afterwards complain or ask any judgment in damages for its consummation. This follows under the well-known principle of the law, that he who consents or contributes to his own injury can not recover for it. Again, if the payment of \$1,500 made by the wife through her attorneys to the plaintiff, after this divorce case was over, was done, as claimed by plaintiff, for the purpose of preventing him from testifying, and he carried that agreement out and did not testify, but did take the money, another reason exists, equally potent, which would prevent him from recovering. And if the payment of that \$1,500 by the wife to him was, as claimed, reprehensible, it involved the plaintiff, as well as the other parties to it, and participation therein would unquestionably estop him from maintaining this action. In explanation of both of these matters—the signing of the agreement and his acceptance of this \$1,500—the plaintiff explains that he so acted for a different purpose and was not intending to be bound by it. I do not believe the law will permit such a defense to be set up against a solemn agreement made by a man with his wife with respect to the custody of his children and the maintenance of them and their property rights, especially where the execution of that part of the agreement with reference to property rights have been carried out. No principle of law which

1906.]

MacBride v. Gould et al.

I can invoke will countenance that defense. He will not be permitted afterwards to say that he was not in earnest because, if he were so permitted, then every solemn legal instrument which might be lawfully executed between the parties could just as easily be set aside and held for naught by one of the parties to the agreement so testifying. Is that sufficient testimony to go before this jury and save this plaintiff from estoppel, which must follow if he had not so testified? It is clear to me that if this jury is to adopt the plaintiff's explanation for his signing this agreement for separation, and of his acceptance of the \$4,000, and his acceptance of the \$1,500, and his reasons for not testifying in court, in the face of all the evidence that has been adduced here, it would be the duty of the court to set such verdict aside. If the evidence of the former attorneys for the plaintiff as to this conduct in defending him in the divorce case be true, no case of any kind is made. If the plaintiff's testimony as to his transaction and dealings with these two attorneys be true, he may have, to some extent, tended to establish a case against them for malpractice and which, of course, I can not consider here. The acts and the things brought out by plaintiff in evidence here are referable to and consistent with proper motives so far as this case is concerned, and waiving the rule that such motives should be favored rather than a wrong motive impugned, it would do violence to law, logic and reason to deduce from the evidence adduced here any such wrongful acts as are charged in this petition. Whether or not there is a scintilla of evidence here to establish this case I need not at this time discuss or determine. It is sufficient for me to say that the rule which I have adopted and which I expect the Supreme Court of Ohio will adopt, is that the court must sit as something more than a mere moderator; and if the evidence so far adduced is in the opinion of this court not sufficient to sustain a verdict, and if, therefore, at the conclusion of all the evidence the court would be compelled to set the verdict aside if for plaintiff, it is useless to take further time and have the defendants adduce their testimony. All the federal courts, and I believe every state in

Bloom v. City of Newark.

[Vol. III, N. S.]

the Union (except Ohio and one other), as well as the logic of the subject, have eliminated the scintilla rule from the law of evidence, and I believe the practice in Ohio, in fact if not in open announcement, has come to this view.

For the several reasons given I instruct the jury to return a verdict for the defendants.

C. C. Pavey, for plaintiff.

H. J. Booth, for defendants.

**LIABILITY OF MUNICIPALITY FOR ASSAULT BY ONE
OF ITS EMPLOYEES.**

[Common Pleas Court of Licking County.]

WILLIAM E. BLOOM V. CITY OF NEWARK, OHIO.

Decided, April Term, 1905.

Municipal Corporations—Liability of—For Tort of Employee—Must be Decided from Nature of the Employment—Assault by Care-taker of Park—Committed while Acting in Line of His Duty.

A municipality is liable in damages for an assault committed by the custodian or care-taker of a public park, where the assault is committed by such employee while acting in the line of duty.

SEWARD, J. (orally).

The case of William E. Bloom v. City of Newark is submitted to the court upon a general demurrer to the petition. The petition alleges that the city of Newark is a municipal corporation; that it maintains and owns a certain park known as the Court House Park; that around this Court House Park is a pavement, and that on the inside of the pavement are certain iron seats used by the public for rest and repose on certain occasions; that it had in its employ John P. Lederer as a custodian and care-taker of said park and grounds; that his duties were to keep the park clean, the pavement clean and free from objectionable articles; that Bloom was sitting on one of these seats on the inside of the pavement; that Lederer, while in the dis-

1905.]

Bloom v. City of Newark.

charge of his duties and acting in his capacity as a care-taker and custodian, assaulted and beat the plaintiff with a club upon his refusal to leave or remove from one of the seats. He claims damages in the sum of \$2,500.

The general demurrer interposed to this petition raises the question of whether, conceding these facts to be true, the plaintiff can recover. Is a municipal corporation liable for the results of an assault and battery committed by one of its employes or servants sustaining the relation to it that Lederer sustained to this city at that time?

According to this petition, this was a tort committed upon the plaintiff by Lederer, who was then acting as care-taker and custodian of this park. The single question raised by the demurrer is as to whether the city is liable in damages for such a tort by an employe or officer while engaged in the duties of his employment; and this question must be determined from the nature of that employment. There are two kinds of functions to be performed by a municipal corporation. One is where the municipality, for which the agent or servant is acting, is engaged in carrying out some governmental function. That is, such as is imposed or required for the protection and benefit of the general public, not having regard to any particular benefit to be derived by the municipality as a corporate body or the citizens in their collective capacity outside of their relation to the sovereignty of the state; such, for instance, as the duty to preserve the peace and protect persons and property. These are governmental functions, closely allied to the sovereignty of the state. The state demands that they shall be exercised, and the city can not be held liable for wrongs or torts resulting from their exercise. The other kind is where the power is exercised for the improvement of the territory within the corporate limits, or the transaction of such business, or the doing of such things as inure to the benefit, pecuniarily or otherwise, of the municipality. In the latter case, the municipality acts for itself and on its own responsibility and for the pecuniary interests of its citizens. The state may grant it the power to do these things, but it has no interest in the exercise of the power, and neither

demands nor insists upon its exercise. The state's authority is merely permissive. In the latter case, the municipality is liable for its tort. If Lederer comes within the latter class, then this demurrer must be overruled.

The defendant concedes in his brief filed in this case the correctness of that proposition. The petition alleges that Lederer was employed as a custodian and care-taker of the park, and that he committed the assault while engaged in the employment and in furtherance of its object. Is the city while engaged in maintaining and caring for a park exercising a governmental function for and on behalf of the state. The state gives it the power to lay out and maintain parks, but that authority is permissive only, to be exercised or not as the city sees fit. And, therefore, the state has no interest in the power so exercised by the city. If Lederer was acting for the city, as is alleged, and the city, through him, was merely attempting to beautify and make more attractive the grounds, then the city would be liable for the acts of Lederer under such employment; and if a person in his individual capacity would be liable, under such circumstances, then the city would be liable; and on that proposition I cite a case in the 42d Ohio State, 625. I do not think this was cited in the brief of counsel, although a very excellent and exhaustive brief was filed. This is the case of *Robinson v. Greenville*—a suit brought for damages by Robinson against the city of Greenville. It is decided by Judge Okey. I read the third branch of the syllabus:

“In relation to power and privileges which are to be exercised by a municipal corporation for the improvement of the territory within the corporate limits, and as to which the pecuniary and proprietary interests of individuals are represented, the liability of the corporation for negligence is largely, if not entirely, measured by the liability of individuals for similar acts; but with respect to police powers, such as suppressing riots and unlawful assemblages, such corporation is, in the absence of statutory provision to the contrary, the agent of the state, and not liable for a failure to perform or negligence in performing duties in that particular imposed by statute.”

Judge Okey, on page 628, says (this is not a case on all fours with the case at bar):

1905.]

Bloom v. City of Newark.

"In an action against a municipal corporation to recover damages for an injury to the person, sustained by reason of the negligence of the agents of such corporation, it is important to ascertain with precision the duty which such agents failed to perform or performed negligently. For, although such corporations derive all their powers from one source, namely, the Legislature, and necessarily perform their functions solely as agencies, yet there is a marked distinction as to their liability for acts of their agents, arising from the different characters in which the corporation is charged with the performance of duties. Thus, with respect to the power to suppress riots and assemblages of disorderly persons, it has been uniformly held, in the absence of statutory provisions to the contrary, that the corporation is a mere agency of the state, and not liable for negligence in the performance of such duties. Upon this principle it has been held that there is no corporate liability for the acts of a mob, although the charter contains this provision as to the duties of council, that 'it shall be their duty to regulate the police of the city, preserve the peace, prevent riots, disturbances and disorderly assemblages.' Then he quotes the 12th Ohio St., 375, which is cited in the brief of plaintiff's counsel.

"Nor is such corporation liable to an individual for damages resulting from a failure to provide the necessary agencies for extinguishing fires, or for negligence of officers and others connected with the fire department, although the obligation to perform such duties is imposed by statute (*Wheeler v. Cincinnati*, 19 Ohio St., 19); nor is a city liable for failure to enforce an ordinance with respect to the storage of oils, although its agents had notice of the failure to observe the ordinance, and notwithstanding the fact that by reason of such non-observance, the property of a citizen of the corporation was destroyed.

"But concerning the powers and privileges which are to be exercised for the improvement of the territory within the corporate limits, and as to which the pecuniary and proprietary interests of individuals are represented, as the construction of a bridge, or placing water mains in a street, the liability of the corporation for negligence is largely, if not entirely, measured by the liability of individuals for similar acts. This principle was applied in *Newark v. Fry*, decided by this court March 22, 1881."

That is a case of a fire on West Main street, which occurred by reason of the testing of a fire apparatus. Mr. Jones is familiar with that case. The Supreme Court held that the city was liable.

“The council of the city of Newark, being authorized to ‘guard against injuries by fire,’ and to purchase fire engines, etc., ‘and all other apparatus and instruments as shall be deemed necessary to the extinguishment of fires.’ ”

The court held the city liable in that case. That case is referred to in 58 Ohio State, and they say, the principle announced in that case is not the law (*Newark v. Fry*)—substantially so. I refer to this case because it speaks of the different functions of a municipality. The court says:

“The ground on which the non-liability of municipal corporations is placed in such cases, is that the power conferred on them to establish a department for the protection of its citizens from fire, is of a public nature, and liability for negligence in its performance does not attach to the municipality unless imposed by statute. The non-liability of the city in such cases rests upon the same reasons as does that of the sovereign exercising like powers; and are distinguished from those cases in which powers are conferred on cities for the improvement of their own territory and the property of their citizens. ‘It is obvious, says Gholson, J., 12 Ohio St., 375, that there is distinction between those powers delegated to municipal corporations to preserve the peace and protect person and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence and business. As to the first, the municipal corporation represents the state, discharging the duties incumbent on the state. As to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done or omitted, it is governed by the same rule of responsibility which applies to like delegation of powers; as to the second, the rules which govern the responsibility of individuals are properly applicable.’

“But it is claimed that the question of the city’s liability in this case is settled in this state by the case of *Newark v. Fry*. This is an unreported case, referred to by Okey, J., in delivering the opinion in *Robinson v. Greenville*, 42 Ohio St., 625, 629. It is not there referred to as an authority supporting the decision in that case, for there the city was held not liable to a person injured by the discharge of a cannon in its streets by an assemblage of disorderly persons, on the ground that the neglect

1905.]

In re George Fairman.

of a city to prevent such assemblages is simply the neglect of a governmental duty. *Newark v. Fry* was referred to as a case falling within the rules of municipal liability for the acts of its agents. The act complained of was, as in this case, the testing of an apparatus for the extinguishment of fires, at which members of the city council were present. There was explosion from some very inflammable materials used to make a fire, which caused the injury complained of, and the city was held liable. What consideration was given to the case, we do not know. It is not supported by any of the authorities referred to; and it is so plainly contrary to the settled law upon the subject, as shown by the authorities, that we do not feel bound by it."

Now, it has been held over and over again in Ohio, that a private corporation is liable for the assaults of its servants. In one case, a railroad case, where a conductor was putting a passenger off of a car and assaulted him unnecessarily, the railroad company was held liable. Applying this to the decision in the 42d Ohio State, if the railroad company is liable in a case of that kind, or a private corporation, or an individual, would be liable under the same circumstances, then, according to the 42d Ohio State the city would be liable.

The court overrules this demurrer, and exceptions.

Jones & Jones, J. Howard Jones and Wayne Collier, for plaintiff.

Phil B. Smythe, for defendant.

FACTS NECESSARY TO WARRANT EXTRADITION.

[Common Pleas Court of Franklin County.]

IN RE APPLICATION OF GEO. FAIRMAN.

Decided, September 25, 1905.

Extradition—Power of Courts to Interfere—Facts Warranting the Issue of a Warrant—Requirement as to, Satisfied, When,—Criminal Law—Habeas Corpus.

1. Under the law of Ohio, with reference to extradition, the facts which constitute the crime must be made to appear, unless the application is based upon an indictment by a grand jury.
2. This requirement is not satisfied by a formal affidavit charging the offense in the language of the statute, but must be met by facts necessary to make out the crime charged.

BIGGER, J.

The power of courts to interfere and examine the grounds upon which the governor of a state has allowed the warrant for the extradition of one of its citizens to another state, is justified by both reason and authority. Hawley on Interstate Extradition, p. 28; *In re Powell*, 20 Fla., 906; *People v. Brady*, 56 N. Y., 182.

Thus Mr. Hawley says, p. 28:

“Any other view would make the executive authority omnipotent, and emasculate, to a great extent, the writ of *habeas corpus* whereby the citizen is assured that he shall not be deprived of his liberty, but by the law of the land.”

In the case of *Work v. Corrington*, 34 Ohio St., p. 73, the case of *People v. Brady*, 56 N. L., above cited, was approved. In the New York case it was said:

“Under the Constitution of the United States the obligation of a state to deliver up a fugitive from justice, on demand of the executive authority of another state, arises when the fugitive is charged with crime within the state demanding the surrender and having jurisdiction of the offense. The question of his guilt or innocence is wholly immaterial; but there *must be a charge of a violation of the criminal laws of the demanding state*. It is a condition precedent to the obligation to surrender that the executive of the state, upon whom the demand is made, be apprised of the *facts upon which the duty deprives*. When the demand is supported by an affidavit as authorized * * * no less degree of certainty is admissible than is required in an indictment for the same offense. If any distinction exists the affidavit should be more full and explicit and the offense should be therein distinctly and plainly charged.”

The difference between extradition based on an indictment by a grand jury and on affidavits before a magistrate and the governor, are well stated by Mr. Hawley, p. 42 of his work on Extradition, as follows:

“Facts are presented to the governor through the medium of *ex parte* affidavits, made frequently as a matter of form, by irresponsible persons, at a long if not a safe distance from the place where the affidavits are to be used. Every one familiar with the case with which such affidavits are procured and the carelessness

1905.]

In re George Fairman.

with which they are sworn to, will readily see that they form a very slender basis for the determination of any question of fact."

I think this language applies forcibly to the affidavits brought here from Illinois to support the extradition of George Fairman from the state of Ohio to the state of Illinois to answer an alleged crime of rape.

In the first place it should be said that extradition should always be jealously granted and especially so in alleged cases of rape where there has been no investigation by a grand jury, and the warrant has *not* the foundation of an indictment, and this is especially so considering that the crime is alleged to have been committed in Chicago where grand juries are in almost continuous session.

Now what is the case upon which the warrant for the arrest and extradition of Fairman was granted by the governor of Ohio.

First, there is the affidavit preferring the formal charge of rape, sworn to by Anna Nichols, who does not pretend to have seen the act committed. Then there is another affidavit by Anna Nichols which details certain conditions which she says existed, which if true would show that the child was affected with some disease of the blood, not necessarily anything more, and also disclosing alleged confessions by the child made some two months after the alleged rape and some ten days after Fairman had left the state of Illinois, and his said relations to the child ceased.

There is also the affidavit of Miss Anne Butts that she often saw the child in the room of Fairman, and that on one occasion the child ran away from the room and that Fairman was excited and acted suspiciously, although no acts are detailed.

This is virtually all the testimony offered to the governor to show rape except the affidavit of the alleged victim, only seven years of age, and that affidavit is in no measure satisfactory. There is nothing in the record to show that this alleged victim knew the meaning of the words "sexual intercourse" and "carnal knowledge" as used in said affidavit, and the court will take judicial notice that children seven years of age do not know the meaning of such words.

The court finds that the facts necessary to constitute rape are not proved by *prima facie* evidence. That the use of the words "sexual intercourse" and "carnal knowledge" coming from one only seven years old do not prove that there was the penetration necessary to constitute rape. The want of a physician's affidavit is very significant in this matter. Bruises and lacerations would naturally be expected but there is no testimony of any outside of that of the mother and daughter, although, it seems from their testimony a physician was visited.

If the court understands the rule in Ohio on the subject of extradition, the facts which constitute the crime must be made to appear unless the application is based on an indictment by the grand jury. *Work v. Corrington*, 34 Ohio St.; *People v. Brady*, 56 N. C.; *Thomas v. Evans*, 14 Low D. (Ohio), 336.

This demand is not satisfied by the formal affidavit charging the offense in the language of the statute but must be met by the facts necessary to make out the crime charged.

The court finds that the proceedings are defective in that no competent affidavit or evidence of the crime of rape was submitted to the governor. The court further finds that said proceedings for the extradition of Fairman were not instituted in good faith for the purpose of enforcing the criminal laws of Illinois, but for the purpose of extorting money from Fairman. The said Fairman is therefore discharged.

W. E. King, for the state.

C. D. Saviers, contra.

1905.]

Cincinnati v. Street Railway Co. et al.

**RIGHTS OF INTERURBAN PASSENGERS TO TRANSFERS
WITHIN MUNICIPAL LIMITS.**

[Superior Court of Cincinnati, General Term.]

**THE CITY OF CINCINNATI V. THE CINCINNATI STREET RAILWAY
COMPANY ET AL.**

Decided, October 21, 1905.

Street Railways—Construction of the Rogers Law—And the Interurban Act—With Reference to Transfers—Consideration for a Transfer—And the Right to Demand it—"Traffic" Agreement—A Misnomer. When—Classification of Passengers as Urban and Interurban without Warrant—Suit to Enforce Agreement as to Transfers Embodied in Franchise—Authority of City Solicitor to Bring—Obligations of Sub-lessee Companies—Merger of Rights.

1. Sub-lessees equally with lessees of rights under a street railway franchise are bound by all the limitations embodied in the grant to the original company.
2. The provision of Section 1777, empowering the city solicitor to sue in the name of the city, "whenever an obligation or contract made on behalf of the corporation, granting an easement or creating a public duty, is being evaded or violated," authorizes a suit by the city solicitor to enjoin traction companies from refusing to give or receive transfers in accordance with the grant to the lessor company.
3. A transfer, issued in accordance with the terms of the franchise granted to the Cincinnati Street Railway Company under the Rogers Law, is not a privilege, but a right to continue the journey, if the passenger so desires, over a connecting line running in the same general direction within the city limits.
4. There is no warrant in the legislation providing for *intra* and *extra* urban railways for the theory of classification of municipal and interurban passengers on any basis which would discriminate in favor of one as against the other with respect to rights of transfer on railways within the city limits; on the contrary, within the city limits urban and interurban passengers have precisely the same rights as to transportation.

HOSEA, J.; FERRIS, J., and HOFFHEIMER, J., concur.

The petition set forth, in substance, that on August 13, 1896, the Cincinnati Street Railway Company, by virtue of certain

resolutions of the Board of Administration of the City of Cincinnati, adopted under and in pursuance of an act of the General Assembly of Ohio, passed April 26, 1895, known as the "Rogers Law," rearranged its routes and was granted certain extensions of time upon its franchises and certain territorial extensions of its street railway routes; and that in connection therewith, and as a condition precedent and consideration for such grants and privileges, said railway company agreed to give, upon demand, to any person paying a cash fare, a transfer good for passage over routes extending in the same general direction; and that such condition being duly accepted by said street railway company, became binding upon it and upon the associated defendant, the Cincinnati Traction Company, its lessee.

That subsequently, by virtue of certain traffic agreements between the said traction company and certain interurban street railway companies, namely, the Cincinnati & Eastern Company and the Rapid Railway Company, whose rights in the premises have been assigned to and acquired by the Interurban Railway & Terminal Company, which is made a co-defendant, the latter company is operating cars from a terminal depot on Sycamore street to a point in Warren county, Ohio, and also to New Richmond, Ohio; that said cars use, in the latter case, a substantial portion of the so-called East End route, and in the former case portions of the so-called Walnut Hills cable route and the so-called Mt. Auburn cable route.

The petition then alleges that the defendant interurban companies, operating cars over the routes and parts of routes designated, refused to receive for passage transfers given by the traction company, which would, by the terms of the Rogers Law resolutions, be good for passage over the route or routes so traversed; and that said Interurban Railway & Terminal Company, in the operation of cars over said tracks, refuses to give transfers to routes of the traction company, as provided in said resolutions; and prays that the defendant be required to specifically perform the conditions of said Rogers Law resolutions of August 13th, 1896; or, in default thereof, that the operation of said cars be enjoined.

1905.]

Cincinnati v. Street Railway Co. et al.

The demurrer filed to said petition involves:

First. The objection of misjoinder as to (a) parties defendant, (b) causes of action, (c) separate causes of action against several defendants; and

Second. That the petition does not state facts sufficient in law to constitute a cause of action.

Following the course adopted by counsel in argument, we will consider the last mentioned objection first, because it raises the principal question in the case. As the demurrer admits the truth of the facts pleaded it must be assumed as true that the Interurban Railway & Terminal Company is operating cars over certain routes and tracks of the Cincinnati Traction Company, lessee of the Cincinnati Street Railway Company, in the city of Cincinnati, by virtue of certain agreements between themselves, and that these parties refuse to interchange transfers as required by the Rogers Law resolutions.

The full latitude allowed the various counsel in the argument and the extended ramifications of the various arguments adduced, render it impossible to follow these in detail within reasonable limits. We, therefore, confine ourselves to as succinct a statement of our views as possible, having regard to the difficulties of the subject.

By the terms of the Rogers Law resolutions as accepted and agreed to, the street railway company was "allowed to charge for each passenger by it carried one cash fare of five cents, subject to the giving of transfers," as specified in said resolutions. The provision for transfers specified the various routes, and, in connection with each, certain other routes to which transfers should be given. Stated generally, the transfers specified were for the continuation of the ride over connecting routes, extending in the same general direction as the route on which the cash fare was paid. The provision begins with the requirement that "the Cincinnati Street Railway Company, its successors or assigns, shall upon demand upon the cars either at the time of payment of fare or within three minutes thereafter, issue transfers to its passengers who have paid the fare at the cash rate, and accept transfers good over its various

routes herein described as follows"—specifying the routes and connections as above stated.

It is clear beyond dispute, upon elementary considerations, that the traction company, as lessee of the Cincinnati Street Railway Company, is bound by all the conditions and obligations imposed by the Rogers Law resolution, under and by virtue of which the right to the occupancy and use of the streets of Cincinnati for street railway purposes is derived, and this is admitted by the defendants.

It would seem to follow, upon legal principles equally elementary, that the traction company, as lessee, could grant to a sub-lessee of its tracks and property no higher or greater rights of occupancy and use than it possesses; and that the sub-lessee could under no circumstances cognizable in equity, acquire a higher right than that possessed by the lessee, because it dealt with the lessee with full knowledge of the legal relations and respective rights of the city, the street railway company, and the traction company, with reference to the subject matter, which were matters of public record. The sub-lessee would be bound also to take notice of the source, character and limitations of the power under which the street railway company or the traction company—both or either—assumed to grant to it a right to the use of tracks and of the streets through which they pass, because all are creatures of law and can act only as the law authorizes, and acquire only such rights as the law permits.

The law under which the contract involved in this case was made, as conceded by both parties, is the act of 1894 (Sections 3443-8 to 3443-13 of the Revised Statutes), commonly called the "Interurban Act." This act provides:

First. For the occupancy, by street railways organized for the purpose, of highways outside of municipalities, by consent of abutting owners and of the authorities in charge.

Second. For the appropriation of private property where necessary.

Third. For leases, purchases and traffic arrangements with street railways in municipalities into or through which it is necessary or desirable to go.

1905.]

Cincinnati v. Street Railway Co. et al.

Fourth. For consolidation with such municipal street railways.

Fifth. For conforming the regulation and powers of such railways to those applicable to other street railways.

We are concerned in the case chiefly with the third section of this act, which is as follows:

“Revised Statutes, Section 3443-11 [*Leases, purchases and traffic arrangements*]. Such companies shall have power to lease, purchase or make traffic arrangements with any other street railroad company as to so much of its tracks and other property as may be necessary or desirable to enable them to enter or pass through any city or village upon the same terms and conditions applicable to other street railroads. And any existing street railroad company owning or operating a street railroad shall receive the cars, freight, packages, or passengers of any other road upon the same terms and conditions as they carry for the general public.”

The main question in the case arises upon the construction and meaning of this section. The language of the statute, upon first impression and considering the general status and relation of the interurban street railway to the municipal street railway, seems to mean this, namely: That while the primary object of the interurban road is to connect neighboring municipalities, yet, to avoid the inconvenience of transfer to municipal cars at the corporate boundaries, on the one hand, and to avoid, on the other hand, the unnecessary burdening of streets not already occupied by street railroads, the Legislature intended to give the interurban roads the required terminal facilities by permitting the municipal and interurban companies to enter into a contract whereby the municipal road in possession may share with the interurban road upon a consideration arranged between themselves, the franchises and privileges already possessed by itself, with the interurban company.

Naturally, in accordance with reason and the principles of law governing parties and rights similarly conditioned, this sharing of the right to use and occupy the streets and the tracks thereon for the operation of cars, must be subject to the terms and conditions governing the use of the right in the original possessor.

This would seem to be true even if no limiting words were introduced into the statute respecting the terms of the contract in this respect, because, on principle, a mere right given to a tenant to contract with a sub-lessee for a joint use must by implication be confined to such right of use as the primary lessee possesses.

It seems plain, therefore, that the words of Section 3443-11, "upon the same terms and conditions applicable to other street railroads," mean, that the right to be shared is that—and that alone—which is possessed by the municipal company, and that the use acquired by the interurban company is to be governed by the terms and conditions governing a like use by the municipal company.

We are strengthened in this view by an admission of one of the counsel for the municipal companies: "The words 'same terms and conditions,' " says the brief before us, "must, therefore, relate to means of transit and rates of fare as those matters exist over the line of railway selected and described by the traffic agreement."

In the oral argument, other counsel while admitting that a *lease* or *purchase* would subject the interurban company to the obligations resting upon the municipal company, contended that a *traffic agreement* was quite a different thing and had no such legal effect. The reasoning upon which it was attempted to support this theory was not clear; and as the two propositions are inconsistent, we must understand the later expression in the brief as an abandonment of the former position. Its significance will be considered later.

There seems to be some confusion, however, in the use of the expression "traffic agreement." The agreement is thus termed in the petition and in argument; but while the petition does not set forth its details, enough appears to show that under it the interurban company is using certain tracks of the municipal company for the operation of its cars to and from its own independent terminal depot in the city. A grant of such use is in the nature of a *sub-leasing* of the tracks, and it seems a misnomer to call such an agreement a "traffic agreement," because the latter implies as an essential condition an *inter-*

1905.]

Cincinnati v. Street Railway Co. et al.

change of commodities or passengers between the roads from one to the other. And it is this sort of an arrangement which seems to be covered by the latter part of Section 3443-11, which provides, in effect, that when the municipal road *receives* the cars, freight, packages or passengers of the contracting interurban road for transportation it shall do so upon the same terms and conditions as they carry for the general public.

The mere name which the parties give to their contract can in no wise alter its legal character or effect, which is determined by the actual facts. In this case the admitted fact is that the interurban company is operating its own cars and carrying passengers over the tracks of the municipal company—which is a character of use indicating, in effect, a leasing.

It is claimed by the city solicitor that Section 2505c, Revised Statutes—passed only four days later than the act already considered—also has application to the present controversy.

This provides, in substance, that a railway company organized to build or operate an electric railway from one municipality or point to another in this state shall be authorized to make an arrangement or agreement with a municipal street railway whereby the passenger cars of the interurban company may be operated over the tracks of the municipal company for such compensation as may be agreed upon, “upon the same conditions and for the same length of time” as those of the municipal company are operated; and be “subject to all the obligations imposed upon the municipal street cars”; that, in so far as the interurban cars use only the tracks of the municipal street railway, it shall not be necessary to obtain any additional grant or franchise other than that obtained by said agreement or arrangement; and provides that the “fare charged in the municipality shall not be greater than that fixed in the franchise held or owned by” the municipal street railway.

The defendants contend that this statute has no application because it is primarily designed for so-called commercial railroads—a contention based, largely, it would seem, upon the absence of any qualifying word before “railway” in the opening

sentence; and, upon a passing *dictum* of Summers, J. (now of the Supreme Court), in *State v. Dayton Traction Company*, 18 C. C., 491 (497), in which he intimates—while disclaiming any purpose to construe the scope of the law—that it may refer to commercial railways only.

We do not deem it necessary here to determine this point, because the fact that these sections were under consideration by the Legislature at the same time, suggests—as Judge Summers also intimates—that they are not in conflict. But, if we accept the cited *dictum* of Judge Summers, and if the construction we have indicated for Section 3443-11 be the true one, then, certainly, they do not conflict; because the Legislature was providing for contracts authorizing a municipal street railway to share its possession of streets with two classes of inter-municipal railways differing only in name but organized for substantially the same kind of traffic, namely, that between municipalities.

The fact, therefore, of itself sheds light upon the intent and meaning of the Legislature in the earlier act; for we can not suppose any material difference was intended, because there were manifest reasons for granting the same but not different privileges. Mere differences in terminology are naturally to be expected where laws are drafted by different individuals.

It should be noted, however, that for aught that appears in the present case, the defendant interurban company may be of the class specified in Section 2505c rather than in 3443-11; for it is a fact of common knowledge that very many of our interurban railways distinctly avoid occupying the highways outside of the municipalities, but build upon private rights of way acquired by purchase, in order to operate at higher speeds and avoid the liability of accidents incident to highway occupancy.

There are but few expressions upon the purpose and scope of the law in question that appear in print, and these do not throw direct light upon the question under consideration. In *State v. Traction Company*, 64 O. S., 272 (281), Judge Shauck refers to the general definition of street railways as immaterial—

1905.]

Cincinnati v. Street Railway Co. et al.

"In view of recent legislation in which the term is applied to roads constructed upon highways—interurban as well as urban—the only requirement being that in construction and operation they shall be consistent with the former and ordinary use of such highways. * * * It is well known that in response to a general demand for increased traffic facilities between cities and the regions surrounding them that the act of May 14, 1894, now cited as Sections 3443-8 to 3443-13, Revised Statutes, was enacted."

In *City of Hamilton v. C. & H. Electric Company*, 5 N. P., 557, it was held that Section 3443-11 presents merely an alternative mode of entering the city. "This" (section), said the court, "may in some sense enlarge the rights of a road built wholly without a municipal corporation, but it would not prevent a road under a proper charter from building into the city."

In an opinion of the attorney-general cited to us from 39 Bul., 113 (115), it is held that an interurban company entering a municipality by virtue of the section under consideration "at once becomes subject to the statutory regulations and municipal control of (applicable to) street railroads proper."

It is contended that the city has no right to sue because it is not a party to the so-called traffic agreement; but we do not understand that the suit of the city is based directly upon the traffic agreement. The city entered into contract relations with the street railway company whereby it granted to it and its assigns certain privileges of operating street cars in the streets upon certain conditions. It is conceded that the traction company, lessee, stands in the shoes of the street railway company, The Legislature meantime granted authority to the traction company to take a partner or sub-lessee under its contract with the city, with whom it is authorized to share its rights and obligations *pro tanto*. The traction company and interurban companies by virtue of this authority and with full knowledge of the conditions, entered into the arrangement whereby the interurban company became, in effect, a second party with the traction company to the franchise-contract under which alone the privilege to use the streets was obtained. This suit therefore is based, not upon the traffic contract, but upon the vol-

untary assumption of rights and the corresponding obligations, under the franchise-contract by the interurban company as one of the contractual assigns of an integral part of the original franchise.

The law under which the traction company assumed to grant, and the interurban companies assumed to accept and exercise, the privileges held by the traction company, and by which alone such transfer of rights is authorized, is part of the agreement whether so expressed in the terms of the latter or not. The law was its sole source and inspiration and it could have no validity otherwise. The acceptance of these privileges was also the acceptance of the obligations attaching to them; and the contract itself was therefore in effect a contract made for the benefit of a third party, namely, the public in its municipal capacity which granted the easement or franchise which is being used. *Weil v. The State*, 46 O. St., 450 (453).

The case, therefore, as it seems to us, falls directly under the language of Section 1777, Revised Statutes, authorizing the city solicitor to sue in the name of the corporation, and, "whenever an obligation or contract made on behalf of the corporation granting an easement or creating a public duty, is being evaded or violated, apply for the forfeiture or specific performance of the same as the nature of the case may require," or for an injunction, as provided earlier in the section.

We have adverted to the admission of counsel for defendants that the contract in question subjected the interurban company to the same conditions as to rates of fare to be charged as were obligatory upon the traction company. This is a virtual admission that the transaction, in effect, brought the interurban company into relations of privity with the city in respect of the franchise contract which established such obligation.

But the fare charged under the franchise granted by the Rogers Law resolutions was defined as a condition of the grant under which the municipal street railway and its assigns were obligated to transport a passenger paying a specified cash sum, not only upon the route upon which he was then going, but a further distance on a connecting route continuing in the same

1905.]

Cincinnati v. Street Railway Co. et al.

general direction, upon his demanding such right. The continued journey, upon demand, is the consideration for the cash fare paid. To cut off half the ride is, in effect, to double the fare; as much so as if a railway company having contracted to carry a passenger from one terminal to the other of a given route, were to collect the entire fare upon the first half and then demand a second fare for the latter half of the route.

It is idle, as it seems to us, to claim that the ride upon a transfer under the franchise in question is a mere "privilege" intended for municipal passengers only, which constitutes no part of the consideration for the fare, and which may be omitted without violating the terms of the contract when transporting a passenger who may come into the city from extra-urban territory. That the contention is not sound is shown, moreover, by the admitted fact that the interurban cars operating over the municipal tracks do also a purely municipal business—although this is claimed to be incidental to the main purpose of transporting interurban passengers.

But it is also admitted that these municipal passengers are denied transfers, and it is manifest, therefore, that the proposed principle of classification is a one-sided doctrine that does not work in favor of the public but only against it. It does not break the force of this obvious deduction to say that the use of interurban cars by the municipal public is "voluntary." This can only mean that the municipal public use the interurban cars within the corporation, knowing that transfers are refused—which begs the question. It is obvious that the theory of separate public rights in respect of transportation over municipal tracks is too shadowy for practical enforcement.

We find no warrant, in the legislation providing for intra and extra-urban railroads, for the theory of classification of municipal and interurban passengers on any such basis as would discriminate in favor of one and against the other, as contended in argument, with respect to rights of transportation on municipal street railroads. On the contrary, as the rights in question emanate from the same source, to-wit, the state, representing the people in their sovereign capacity, we must suppose an intention to grant the same rights to all.

Such, in effect, we find and construe to be the meaning of the specific language of the statute under consideration, namely, an expression of legislative intent that interurban passengers brought into the city over municipal trackways controlled by municipal street railways, shall *not* be discriminated against, but shall have exactly the same rights of transportation within the city as residents.

Entertaining these views, we must overrule the demurrers as to the main grounds stated.

The other grounds, viz., of misjoinder of defendants and of causes of action, seem to ignore the statement of the petition admitted by the demurrer to be true—that the rights of contract acquired by the Rapid Railway Company and the Cincinnati & Eastern Railway Company have been assigned to the Interurban Railway & Terminal Company. This would in effect be a merger of two contracts of the same nature in one defendant, which, therefore, becomes in effect one contract for the purposes of this suit; or, in another aspect, brings two causes of action into such relation as that they may be combined in one suit. The merger of the rights acquired by the separate interurban companies in the terminal company, makes the latter company the real party defendant in interest, and leaves the original contracting interurban companies nominal parties only. The demurrers are therefore overruled on these grounds also.

As the sole questions involved in this litigation are raised and determined by these demurrers, a decree will be entered in behalf of the plaintiff and against the defendants substantially as prayed, the precise terms of which, in case counsel can not agree, will be settled by the court upon presentation of drafts by counsel.

Demurrers overruled, and judgment for plaintiffs granting the prayer of the petition.

John W. Warrington, E. W. Kittredge, Ellis G. Kinkead and Frank Dinsmore, for the demurrer.

Chas. J. Hunt and Albert H. Morrill, for the city.

1906.] Stoppel, Administrator, v. Plageman.

**WHEN A DECREE FOR SPECIFIC PERFORMANCE WILL BE
REVERSED.**

[Superior Court of Cincinnati, General Term.]

WILLIAM STROPPEL, ADMINISTRATOR OF CARL WIENING, v.
HERMAN PLAGEMAN.

Decided, October, 1905.

Specific Performance—Grounds Upon Which a Decree for, Will be Reversed—Error—Misapprehension—Inadequacy of Consideration—Circumstances Indicating Delusion as to Property Values.

1. A reviewing court will not disturb a finding involving specific performance, unless it is made to appear that the finding was based upon an error or misapprehension.
2. The grace of the court which prompts enforcement of specific performance of a contract should not be extended, when in addition to inadequacy of consideration there appears to have been a delusion on the part of the seller with reference to property values, and the circumstances compel the belief that at the time of the transaction he was not of sound mind.

HOFFHEIMER, J.; LITTLEFORD, J., and FERRIS, J., concur.

The defendant in error was the plaintiff below. The action there brought was for specific performance of a contract for the sale of real and personal estate, made by the decedent a few days prior to his death. The issue as tried necessitated the consideration of a number of defenses to the contract among which were:

1. That the consideration named and set forth in the contract was grossly inadequate.
2. That the decedent at the time of the making of the contract was *non compos mentis*.

Upon the issues, the court below entered a decree for the plaintiff. This proceeding is to reverse such finding.

It is claimed by plaintiff in error that the court below erred in overruling the motion to set aside its findings and judgment, and in refusing to grant a new trial, on the ground that same was not supported by sufficient evidence, and is contrary to law.

It is well settled that specific performance of a contract is a matter of grace depending upon the circumstances of each particular case as it may appear, and courts of equity invariably

refuse to lend their aid, unless the clearest principles of equity and good conscience demand the enforcement of the particular contract. But if the court grants or refuses specific performance of a contract, a reviewing court will not disturb the finding, unless it can be made to appear that the finding below was erroneously reached—that it was based upon an error or misapprehension. After carefully reading the record, we are of the opinion that the court below erred with reference to the probative value of certain evidence, that tended to show a delusion on Wiening's part, on the very subject-matter of the contract sought to be enforced, and further that error was committed with reference to the legal value of the testimony of Ebersole and Oesper relating to values (*City v. Neff*, 20 Bull., 8), and bearing on the element of gross inadequacy. As will appear from the view taken by us of this case, this testimony was of a highly important character, and bore directly upon the very elements, which, in actions of this character, prompt courts of equity to withhold relief leaving the parties to their usual remedies at law. The reading of the record showing all the facts disclosed in the case, has led the court to conclude that there was established in this case, by competent testimony, the following state of facts:

That the contract complained of was entered into by the decedent with the plaintiff in error in 1904, when he was sixty-three years of age; that prior to that time, the decedent had been a frugal and industrious teamster, and by the exercise of rigid economy had accumulated about ten thousand dollars, including the real estate in question. That at the time of the transaction he was of feeble mind and incapable of engaging in a business transaction requiring the exercise of skill or ability for the protection of his own interests. That the other contracting party was a man of much stronger mental capacity and was shrewd, and that by reason of his shrewdness, overreached the decedent, Stroppel, and obtained thereby real estate and personalty at a grossly inadequate price. The transaction called in question was concluded on the 23d day of March, and on the 25th day of the same month, Stroppel was found dead, under circumstances which indicated self-destruction.

1905.]

Stroppel, Administrator, v. Plageman.

The testimony further discloses facts that indicate to our mind that at the time of entering into the contract, Stroppel was possessed of delusions with respect to property, the subject-matter of the contract to be enforced, that indicated a mental aberration, and disclosed delusions with reference to values of the property that unfitted him entirely to contract with relation thereto. The facts, therefore, as disclosed by the record, do not, in our judgment, necessitate a finding based upon the mere inadequacy of the consideration alone, but there are also other salient and suggestive facts that plainly indicate the necessity for the application of the equitable doctrines, the principles of which were announced by Justice Cooley in 47 Mich., 454:

"If the contract was unequal; if he has bought the property for a price which is wholly inadequate; if there is any indication of over-reaching or unfairness upon his part, the court will turn him over to his usual remedies."

In *Wingard v. Frey*, Wright's Reports, 105, Lane, Justice, said—

"Chancery will not enforce a specific performance of a contract where there are indications of unfairness or fraud, but the parties will be left to their remedies at law. Disparity of price where no reason is shown for selling at a sacrifice, is a circumstance that will induce chancery to leave the parties to their legal remedy."

The testimony recites facts which are offered as an excuse for the apparent inadequacy of consideration, and yet the testimony considered as a whole, does not, we think, afford a proper explanation for the strange and unnatural act of the theretofore industrious and frugal individual who suddenly determined to sell the home and his property at what the court finds from the testimony was far below its market value. Men at that time of life are not accustomed to part with the accumulation of years, with property at a loss, where there is no apparent necessity. We believe that the conduct of the decedent is *entirely incompatible* with the theory that he was incapable of contracting at the time that the instrument was entered into; had delusions with respect to property that unfitted him to trade with reference to it, and that all the facts considered, make it impossible to reconcile his conduct with the theory that he was

of sound mind at the time of the alleged agreement. When facts of this character are joined with inadequacy of consideration, equity will not fail to give relief (Pomeroy on Specific Performance, Section 179; Frey on Specific Performance, pages 235 and 252).

In *Hughes v. Roth*, 18 Circuit Court, 804, Judge Day rendering the opinion, said:

"Where the parties stand not on an equal footing, one being shrewd and keen, the other weak, obtuse and easily influenced, the contract appearing not fair and free, and being obtained by means that equity will not recognize, *it will not be enforced.*"

In *Tracey v. Sackett*, 10 O. S., 54, where the action was to set aside a deed and not for a specific performance, the syllabus is important as indicating the temper of our Supreme Court on matters of this character:

"Acts and contracts of persons of weak understanding and who are, therefore, liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion either that the party through undue influence has not exercised a deliberate judgment or has been imposed upon, or overcome by cunning or artifice. Where there is imbecility or weakness of mind arising from old age, intemperance or other causes, or where there is weakness of mind and circumstances of undue influence and advantage in either case, a contract may be set aside in equity; approving 12 O. 75." See also *Albert v. O'Neill*, 102 Penn. S., 312; 152 Penn. S., 529; 147 Ill., 52; 82 Appellate Division, 614; 4 Huston, 28; 69 Ill., 294.

Considering the case as an entirety and applying the rules indicated by the cases referred to, we are of the opinion that the language employed by the learned judge in 102 Penn., 302 (*Albert v. O'Neil*, at page 306), applied to the case at bar:

"It is sufficient to say that the facts and circumstances disclosed by the testimony and uncontradicted, do not present in our judgment such a case as should induce a chancellor to enforce a specific performance of the contract"

Thus believing, we can not agree with the finding of the court below, and the same, therefore, is reversed.

Andrew L. Herrlinger and *John C. Healy*, for plaintiff in error.

George S. Baily, for defendant in error.

1905.]

State, ex rel Will, v. Taylor et al.

COLLECTION OF OMITTED TAXES BY PROSECUTING ATTORNEYS.

[Common Pleas Court of Franklin County.]

STATE, EX REL JOHN A. WILL, v. EDWARD L. TAYLOR, EX-PROSECUTING ATTORNEY, ET AL.

Decided, July 8, 1905.

Tax-payer—When Clothed with Legal Status of—Assistant Prosecuting Attorneys, Not Officers But Authorized Assistants of an Officer—Compensation of Prosecuting Attorneys—Provision Therefor in Different Counties—Contract by County Commissioners with Prosecuting Attorneys for Collection of Taxes—Sections 1197, 1271, 1274, 2862 and 845.

1. The moment property is listed and returned to the auditor it becomes charged with taxes, and its owner assumes the legal status of a tax-payer.
2. Assistant prosecuting attorneys are not officers in the sense the word is used in the state Constitution, but are persons authoritatively appointed to assist an officer in an office provided by law.
3. A statute making an exception of certain counties should be distinguished from one which limits the operation of the law throughout the state; and the statutory exceptions which have been made relative to the compensation of prosecuting attorneys in different counties, the provision for the appointment of assistants in certain counties, and the further provision that in counties not having a county solicitor the prosecuting attorney shall act as the legal adviser of the county commissioners who shall fix his compensation, are not unconstitutional.
4. Where the county commissioners enter into a contract with the prosecuting attorney for the bringing of suits for the collection of taxes on property theretofore treated as exempt from taxation, and by agreement a test case is tried, the defendants in other similar cases agreeing to abide the result, the percentage the attorney is to receive in the event of his securing a judgment is not limited by either law, justice or equity to the amount involved in the test case.
5. The discretion lodged with county commissioners in the matter of fixing fees to be paid for the collection of taxes in such cases will not be interfered with by a court, where the fee is made contingent and is fixed at five per cent.; and where two separate

contracts have been entered into, and the parties refuse to treat the second as superseding the first, a court will not under the circumstances of this case decree differently.

6. An allowance of \$1,250 per annum, made by county commissioners to a prosecuting attorney, whereas Section 845 limits the allowance to \$250 for each case in which counsel is employed, will be upheld by a court only in the event of the number of cases exceeding five in a given year.

DILLON, J.

The relator, a tax-payer, on the refusal of the prosecuting attorney to bring action, has filed a petition of considerable length, in which he asks that the defendant prosecuting attorney and his assistants be enjoined from drawing certain warrants for fees and compensation growing out of litigations against insurance companies to recover taxes; that all the acts and statutes hereinafter named under which the prosecuting attorney and his assistants have been acting in exercising the functions of their office, and under which the county commissioners and county auditor and treasurer have been employing counsel, may be declared unconstitutional and void; and that defendants be required to account for and refund all moneys which they have heretofore drawn from the county treasury under said sections. The issues are made up as to certain questions of fact and a stipulation has been filed agreeing to certain facts in this case and the case has been argued on briefs and submitted to the court.

This case is one of considerable importance; it was advanced for hearing and was the last case heard by this court, and the necessity for immediate decision upon the case will be some excuse for the brevity which the court must employ in its decisions.

The first question raised is as to whether or not relator is a tax-payer? In last April the relator returned \$100 of personalty for taxation, but will not until December actually pay any taxes thereon. I think this is sufficient to give him the legal status of a tax-payer as contemplated by the statute. The tax itself is a burden imposed by law upon property and a tax-payer is, of course, the one who is obliged to pay the taxes. I

1905.]

State, ex rel Will, v. Taylor et al.

do not think the time of payment is material. He has not defaulted, and he now stands charged with the payment of taxes which will be due in December, but after property is once listed and returned to the auditor, it is said to be taxed. If any serious question should be made of this point a substitution may be had and the same decree entered as is now authorized by this opinion.

The first question raised by counsel for plaintiff is as to whether or not the assistant prosecuting attorneys are officers. This question becomes important, in view of the argument that if they are officers they must be elected—not appointed—and their compensation provided by the statutes hereafter cited, would have to be fixed by law, and that power could not be delegated. It may be observed that this construction of the word officer and office as used in the Constitution has always been one of great difficulty, and it may be remarked, not at all facetiously, that the only satisfactory method of determining many of these cases is to have the opinion of the court of last resort.

The provision for assistants is created by the Legislature. They are required to give bond and to take an oath of office, their term of office is fixed by the Legislature for a definite time and they are paid out of the county treasury. They are not, therefore, temporary agents or deputies, but have duties to perform concerning the public. It is certain that they must be distinguished from servants, employes and deputies who take no oath, give no bond, who serve at the pleasure of the chief officer, and whose compensation is paid by such chief officer. And yet each and all of these attributes are true of many deputy clerks of our different county officers and they have been held not to be officers within the meaning of the Constitution.

In the case of *State v. Brennan*, 49 O. S., 33, the act of March 14, 1890 (89 O. L., 89), created the position of stationery storekeeper for Hamilton county at a salary of \$1,500 a year and provided that he should be appointed by the clerk of the court of common pleas. This act was held to be the creation of a county officer, and therefore was in conflict with Sections 1 and 2 of Article X of the Constitution, which require all

county officers to be elected. In the case of *State v. Kendle*, 52 O. S., 356, the act of April 23, 1894 (91 O. L., 176), which creates and confers upon the common pleas judges power to appoint jury commissioners for each county, was held not to be in conflict with any provision of the Constitution, and that such commissioners were not officers within the meaning of the Constitution. These commissioners were appointed for a definite time, and were required to take the oath and had a definite function to perform. In that case the court admitted the difficulty of this question, and seemed to base their opinion that the act was constitutional on the ground that there was a reasonable doubt about the question, and in such cases the doubt should be resolved in favor of the law. The theory of the court further was, that such officers were but hand-maids or assistants to the court in carrying out its functions.

Of course in a general sense jurors themselves are officers of the court. Court bailiffs and constables may likewise be termed officers, and the deputies of our various county officers are also in a sense officers. These assistant prosecuting attorneys have no functions different from that of the prosecuting attorney himself, and their powers are not equal to his. Even the power of an assistant prosecuting attorney to enter the grand jury room has only recently been conferred by statute. They are subordinate to him, and as to any question of policy to be pursued they have no voice as against the will of the prosecuting attorney. In the creation of these assistant prosecuting attorneys it will be observed that no new county office was created. The law simply provided for assistants to carry out the function of the office previously created, and I am, therefore, of the opinion that the office of assistant prosecuting attorney, is not one as that word is used in Sections 1 and 2 of Article X of the Constitution, but that they are persons authorized to be employed for the purpose of assisting an officer in an office already provided for by law.

Certain moneys were drawn by the defendant prosecuting attorney under Section 1297 as salary. This section provides that prosecuting attorneys shall receive an annual salary of not

1905.]

State, ex rel Will, v. Taylor et al.

more than \$3,500 in Hamilton county, \$4,000 in Cuyahoga county, \$2,000 in Lucas and Franklin and Montgomery counties, and all counties having less than 20,000 inhabitants \$400, and in all other counties \$2.00 for each one hundred inhabitants.

If the uniform method prevailed of \$2.00 for each 100 inhabitants, which applies to all but the particular counties named, the Prosecuting Attorney of Franklin County would have drawn almost double the \$2,000 which was paid him. If the statute be read to mean that in all counties the prosecuting attorney's salary should be \$2.00 for each one hundred inhabitants, excepting the counties named, the question might well arise as to whether or not the exception itself is not void, and these prosecuting attorneys would have a right to complain and insist upon a rate of \$2.00 for each one hundred inhabitants. It can not be claimed that it is the intention of the Constitution, Section 26, Article II, requiring all laws of a general nature to have a uniform operation, that each prosecuting attorney shall receive the same compensation, but whether this section be constitutional or not, it is not necessary here to consider. This statute has been in existence since 1862 and all the business of the state of Ohio, and of every prosecuting attorney in the state has been transacted thereunder. Compensation, therefore, paid to such officers, can not be recovered back on clearest principle, nor can any of the acts of these officers be impugned even if they should be held to have been acting *de facto*. This was the only statute in existence which provided compensation for the prosecuting attorneys of the state. And that a *de facto* officer is entitled to have considered and treated that, not only his services as such officer were legitimate, but also the compensation attached thereto, I think is fully sustained in the case of *State, ex rel Attorney-General v. Beacon*, 66 O. S., 491. If the division of compensation provided by 1297 is such as presents a vice under the Constitution of the state of Ohio, it would seem to me the only persons who could complain would be those in the excepted counties who receive less than \$2.00 for each one hundred inhabitants, nor am I disposed to believe that a reasonable limitation upon this basis of \$2.00 per one hundred inhabitants in the

larger counties is unreasonable or special in that it applies to all the large counties. Certainly no public interest will be subserved by enjoining the payment of any salary to any of the prosecuting attorneys of this state. In the Cleveland case above cited the Supreme Court of Ohio found that each officer of the city of Cleveland was acting under an unconstitutional law, and that these acts provided not only for the title to the office, but also for the compensation to be paid such incumbent.

But it is claimed by the plaintiff that Section 1297 is unconstitutional because there is not a uniform rate of compensation provided for. It is certainly right and proper that there should be a different rate of compensation provided for in the different counties. It would be carrying the recent doctrine of the Supreme Court to the production of great mischief and vice to say that because counties like Hamilton county or Cuyahoga or Franklin county must have officers of great ability, who must be paid large compensation, and who also must have assistants to perform their work, that, therefore, the prosecuting attorney in the smaller counties in the state have the same compensation and the same assistants. The compensation of prosecuting attorneys as such is of course a matter of general nature, but the rate of compensation is one of local nature, and each county should have the right by law to pay its prosecuting attorneys a reasonable compensation for the particular work of that kind, and not be compelled to pay the sum of \$4,000 because the larger counties must pay that compensation. The distinction in salaries of 1297 are eminently just and reasonable, and the only party who could complain at all would be the counties which are excepted from the \$2.00 rate. But if I should be disposed to take the extreme view and apply the Cleveland case with a vengeance, I would not enjoin any action under this law until the Legislature has had full and ample time to provide a law to take its place.

The next statute complained of is 1271. This section provides that in Hamilton county, Cuyahoga county, in Franklin county and in Lucas county, assistant prosecuting attorneys may be appointed upon the nomination of the prosecuting attorney

1905.]

State, ex rel Will, v. Taylor et al.

by the common pleas judges. In Franklin county a limit is placed as to their compensation, but it may be made any sum less than that as the judges may determine. It is claimed on the part of the plaintiff that this section (which has since been repealed and the new statute substituted) is unconstitutional because it provides for assistant prosecuting attorneys in a few counties only. Much of my observations upon the previous statute may be applicable here. It is true that the general subject of prosecuting attorney is one of a general nature and must have uniform operation throughout the state, but the question as to whether or not there is needed one, two, three, or four assistant prosecuting attorneys is purely local, growing out of the increased population and large business of a few counties, and with which only a few counties are concerned. The needs of these few large counties of several assistant prosecuting attorneys should not compel us to saddle the same number of assistants upon every county in the state, but it is only necessary for me to say as far as this section here is involved, that the money which has been paid out under that act can not be recovered back whether the act was unconstitutional or not.

The very wholesome discussion of the court in the case of *State v. Gardner*, 54 O. S., 24, is quite refreshing in view of some of the present extreme theories advanced which would, it seems, take from every county the last vestige of home rule, and foist upon counties and cities expensive governments and officials under the guise of necessity under the Constitution, and this last named case is a sufficient answer to the claim that any money paid out under these old sections may be recovered back. In this act the Legislature itself fixed the compensation and only authorized the judges to decrease the amount if they deemed best.

The next section involved is 1274. This section provides that the prosecuting attorney shall be the legal adviser of the county commissioners and other county officers, and for his services the county commissioners shall make such an allowance as they think proper. The section further very properly provides that this act shall not apply to any county having a county solicitor.

It is claimed that because of this last provision the act is unconstitutional. Counsel in making this claim fails to distinguish between a statute making an exception of certain counties, and one which simply limits the operation of the law uniformly throughout the state. This act does not say that the provision shall not apply to certain counties, but the provision is most applicable and is made to apply to every county generally, excepting those who come under a certain provision and the way is open and clear to any county to bring itself under the exception as it may wish. Therefore, any county which shall obtain for itself a county solicitor is forbidden to also waste the county funds by employing a special attorney for civil work. The operation of this statute is general and uniform and is not exclusive of any county. Any county, therefore, which may now or hereafter have a county solicitor to take care of the civil business of the county is rightfully and wisely prevented from wasting the county funds by also employing the prosecuting attorney. There is not a particle of doubt as to the constitutionality of this section as well as to the wisdom of it.

It is further claimed, however, that this provision is unconstitutional because it permits the county commissioners to fix the compensation. While no claim is being made under this statute by the defendants herein, plaintiff has raised the question and desires an opinion on the same, and I will, therefore, pass upon this second point involved. The right of the commissioners to fix compensation has been recognized almost since their creation. The employment of an attorney by them and the payment of him of his compensation is the exercise of a function no different from their employment of a contractor to build a house, or the purchase of supplies. The right of the commissioners to employ counsel for the use of the county and their officials is not denied. The payment to such counsel for their services is not the fixing of the compensation of an office, and is not forbidden by any law which has been cited to me.

The next section involved is 2862. This section provides that whenever any action may be commenced against the county treasurer or county auditor or other county officer, for perform-

1905.]

State, ex rel Will, v. Taylor et al.

ing or attempting to perform any of their duties, their reasonable counsel fees may be allowed them. The same proviso, however, is here found as was above discussed, to-wit: That where a county has a county solicitor it shall be his duty to perform these legal services and the act shall not apply. I have already answered this claim.

The next section involved here is Section 1001-2-3 (90 O. L., 67), which permits the commissioners or any county officer to have counsel in cases in the United States court either for or against them. The same claim is made against this statute that it exempts such officer to so employ counsel where they have a county solicitor.

The next section involved is old Section 845 (91 O. L., 142). The same reason applies to this statute as to its exempting counties having county solicitors. The new Section 845 (97 O. L., 304) it is claimed is unconstitutional because it contains more than one subject. This has been sufficiently answered by our Supreme Court and need not be discussed here. The other complaint against this section is that it permits the county commissioners to fix the compensation. This I have also decided does not affect the constitutionality of the act at all. Counsel claims with regard to this section, however, that the attorney who was employed by the commissioners should be an outsider, and should not be the prosecuting attorney who has his own duties to perform. The argument made under this head might be conceded to be proper before the legislative body, but the law itself being constitutional, and no law or constitutional provision forbidding the prosecuting attorney to be employed to do such work, it is not for the court to substitute its judgment as to the propriety of the county commissioners employing the prosecuting attorney. The answer to this argument is that the law itself permits it and does not prohibit it, and the court can not substitute its discretion for that of the commissioners, however much it might, as a matter of policy, disagree with that board.

On October 16, 1900, the commissioners made a contract by resolution whereby the defendant prosecuting attorney was em-

ployed to represent the auditor and treasurer in all suits which may be instituted against those officials, or which they might institute for the collection of taxes, with special reference to foreign corporations which has securities deposited with the officials of the state of Ohio, and it thereby allowed a contingent fee of five per cent. upon all money which should be paid in by reason of his services. The resolution itself refers to any suit or suits which might be instituted by or against. Under this contract the defendant attorney tried a test case in the United States Court which went to the Supreme Court of the United States, and which was successful. Certain other foreign corporations agreed to be bound by the test case thus submitted. It is claimed that recovery can only be had for five per cent. of the amount recovered from the particular case filed and taken to the Supreme Court of the United States. I know of no doctrine of law, justice or equity which could be applied to this contract and which would sustain such a contention. It is true the treasurer had his remedy under Section 1095, which he might exercise. Just why the treasurer did not, in the exercise of his discretion, pursue that particular method of obtaining this money, it may not be pertinent for the court to inquire, but one thing is quite evident to the court, and that is that had the treasurer attempted any such form of collection, these foreign insurance companies would have promptly taken him into the United States Court and the test case would have gone to the United States Court just the same. The question involved was a most novel one, and one of great importance. Of course the prosecuting attorney might have brought as many actions as he pleased, and the insurance companies might have done the same thing, but the method pursued was the orderly and legal one, to have one case determined for all and to be used as a precedent.

As to the amount of these fees, that was discretionary with the commissioners. It is familiar to the legal profession that where an attorney takes a case upon a contingent fee, that is to say, where he is to receive no pay at all unless he is successful in obtaining a fund, that the amount of fees are higher

1905]

State, ex rel Will, v. Taylor et al.

than where he is to be paid for his services irrespective of the results of litigation. Contingent fees range all the way from five per cent. to fifty per cent., and while I do not know all the facts and circumstances of these cases I am not prepared to make any criticism of the commissioners for their act in making the compensation five per cent. on a basis of recovery, and nothing if they were not successful.

It is said, however, that by this agreement of October 16, 1900, the prosecuting attorney can only have five per cent. upon any suit which was brought in the Federal court, because Section 1001-2-3, only authorizes the employment of actions brought against the officers in the Supreme Court and that since only one case, to-wit, the Western Insurance Company. Of course the prosecuting attorney can not be paid twice. If he was paid a commission of five per cent. for taxes brought in by reason of the Western Insurance Company, he can not again be paid a commission upon the same taxes brought from some other source, but I fail to find any such situation. The taxes which were collected and brought into the county treasurer by reason of the Western Insurance Company case, whether the parties had their suits actually brought or were biding by the result of that case, should be the basis of the prosecutor's five per cent. commission.

On April 9, 1904, the defendants, Taylor, Seymour, Webber & King were employed to act as counsel for the treasurer and auditor in three cases, 1154, 1155 and 1156, in the Circuit Court of the United States, Southern District of Ohio, and also were authorized to proceed under the laws of Ohio to collect all taxes and cover the same into the treasury, and were allowed compensation of ten per cent. for recovering the taxes by whatever method they would pursue.

This contract refers exclusively to a definite set of persons, to-wit, certain insurance companies which have deposited with the superintendent of insurance of the state and was limited to those particular companies.

On May 8, 1904, however, a general contract was entered into whereby the defendant attorneys were made legal counsel and

advisors for the board of commissioners and all the other county officers and boards. They were, by this contract, bound to furnish all these persons with opinions and instructions, to defend and prosecute all actions for or against any of them, and their compensation was fixed.

The question raised is as to whether or not this superseded the special contract for special purposes which had been entered into less than a month before. If the parties, by the language used in this second contract abrogated the first, no recovery can be made under the first contract. I can not so construe the second contract. The specific work there outlined and which was to be performed upon a contingent fee, and which work had been entered upon, renders it very doubtful that it was intended to be and was superseded by the general contract afterwards entered into. The parties themselves did not so treat their contracts, and they themselves have refused to abrogate the first, and have never considered that they did abrogate it. If either party should attempt to abrogate it, it would still be in the power of the other party to raise the question and perform the other contract, and since they both agree and consent that it was never abrogated, we would be in the same position as we were before. It is quite evident that the county commissioners could not abrogate the first contract without the consent of the parties thereto, and they themselves having expressly disclaimed any such interpretation of their second contract, I do not believe it is in the province of this court to so declare unless the second contract would clearly take the place of the first.

Another complaint is made that an allowance of \$1,250 a year was made commencing September 16, 1899, to the prosecuting attorney under Section 845. This section provided that the county commissioners might allow not to exceed the sum of \$250 in each case in which counsel may be employed, either in bringing or defending a suit if they are acting as a body corporate for the county. The county commissioners in lieu of this allowance passed this resolution agreeing to give the prosecuting attorney \$1,250 a year, being an average of five cases per year. The legality of the contract depends altogether

1905.]

State, ex rel Will, v. Taylor et al.

upon what the actual facts have been since that time. If the number of cases would exceed the average of five cases a year during the incumbency of the defendant prosecuting attorney, I will sustain the amount paid out under this agreement. I can readily see that if the county commissioners have had a great many cases, and they found they would be out a large amount of money, that they might in the interest of economy make such a contract, but if, as a matter of fact, there have been on an average of less than five cases a year, the contract will have to be annulled as to the difference between \$1,250 a year and the maximum which the county commissioners might have allowed for the actual cases. I allow all the expense items.

A final complaint is made by the plaintiff that, assuming all these acts to be constitutional, and all the contracts to be legal and giving defendants the benefit of every claim made by them, nevertheless, they have been paid the sum of \$37,468.19, but would only be entitled, as a matter of fact, to \$35,065.19, and, therefore, they have on their own admission been overpaid \$2,403. This is squarely denied by the defendant, and if the parties can not agree upon these facts, of course the court will order an accounting.

J. S. Gill and M. E. Thrailkill, for plaintiff.

George S. Peters and E. L. Taylor, Jr., for defendants.

Liggett, Adm'x, v. Estate of Liggett et al. [Vol. III, N. S.]

**OLD NOTE OF DECEASED HUSBAND HELD BY HIS
WIDOW.**

[Probate Court of Union County.]

MARTHA LIGGETT, ADMINISTRATRIX, v. ESTATE OF GIDEON
LIGGETT ET AL.

Decided, September, 1905.

*Executors and Administrators—Statute of Limitations—Not Suspended
by Appointment of—Nor by Coverture—Continuing Trust not Cre-
ated under Section 4974—Partial Payment of Old Note in Her
Favor—Made by Wife as Administratrix.*

1. The appointment of an executor or administrator under the laws of Ohio does not suspend the operation of the statute of limitations.
2. The relation of the executor or administrator to the estate does not create a continuing and subsisting trust under Section 4974, Revised Statutes.
3. The common law rule of the unity of interest between husband and wife preventing the application of the statute of limitations to claims existing in favor of the wife against the husband during coverture, on grounds of public policy, has been abrogated in Ohio by statute.
4. An executor or administrator can not apply the assets of the estate to the payment of his claim against the decedent, until after the same has been presented to and allowed by the probate court.

Petition of administratrix for allowance of claim against estate.

This is an action brought under Section 6100, Revised Statutes of Ohio. The plaintiff alleges, in substance, that she is the duly appointed and qualified administratrix of the estate of Gideon Liggett, deceased. That she is the owner and holder of a certain claim against said estate founded upon a promissory note, of which the following is a copy:

“March 25, 1887.

“On demand, I promise to pay Martha Liggett five hundred and fifty dollars, for value received.

“GIDEON LIGGETT.”

That an endorsement and payment has been made thereon as follows: “March 24th, 1902, at 12:20 standard time. Received on the within the sum of fifty dollars (\$50.00).”

1905.]

Liggett, Adm'x, v. Estate of Liggett et al.

. That no further, or other, endorsements have been made thereon; that no payments have been made on said claim, and no set-offs exist against the same, except as above set forth; and that there is due plaintiff on said note the sum of \$995, with interest from March 24th, 1903. The names of the heirs are set forth, and the petition concludes with the usual prayer for allowance of the claim.

The heirs of said decedent filed their answer to this petition setting up four grounds of defense, viz:

1. They deny the execution of the note set up in plaintiff's petition.

2. They aver that if said note was executed by said Gideon Liggett it has been fully paid.

3. That said note is barred by the statute of limitations; and

4. That the indorsement of \$50, appearing as a credit on said note, was never in fact paid to said Martha Liggett by Gideon Liggett, or any one else, but was placed on said note by some person after the death of said Gideon Liggett, and that whatever indorsement appears thereon was for the sole purpose of avoiding the statute of limitations. The plaintiff files her reply, denying the second, third and fourth defenses.

BRODRICK, J.

The clear and undisputed evidence establishes the following facts: The note set forth in the petition is the genuine note of Gideon Liggett, deceased. Said Gideon Liggett died March 17, 1902. On March 21, 1902, Martha Liggett filed her application in this court for appointment as administratrix of the estate of Gideon Liggett, deceased, and on March 24, 1902, she presented her bond as such administratrix and the same was approved and letters of administration were issued to her. After the issuing of said letters, and while she was the duly appointed and qualified administratrix of the estate, said Martha Liggett drew from the People's Bank in Marysville, Ohio, the sum of fifty dollars, which was, by her attorney, indorsed on said note. No payment was ever made on said note by Gideon Liggett, or any one for him, during his lifetime. Plaintiff's petition herein was filed in this court May 7, 1903.

Liggett, Adm'x, v. Estate of Liggett et al. [Vol. III, N. S.]

The only question for determination by the court is whether this claim is barred by the statute of limitations. Counsel for plaintiff insists, in argument, that the statute of limitations does not apply, for either of four reasons, viz:

1. That the appointment of the administratrix, and the provision of the statutes allowing her eighteen months in which to pay the claim, suspends the operation of the statute as to his claim.

2. That the plaintiff, being administratrix of the estate, creates a "continuing and subsisting trust," and thus brings the case within the exception stated in Section 4974, Revised Statutes.

3. The statute does not run against a married woman during the lifetime of her husband, for the reason that there is such unity of interest that public policy demands that she be not required to sue her husband; and

4. The indorsement by the administratrix of a payment on the note takes the case out of the operation of the statute; and that if she was in error in making this payment, she could only be held responsible for whatever damage might result therefrom.

It is my earnest desire to fairly and impartially examine each of the claims made by counsel, in order that justice may be done in accordance with the facts as above set forth.

The note herein presented for allowance is a demand note and the statute of limitations commenced to run from the date of the note, and unless prevented in some manner above set forth, it was barred by the statute in fifteen years from the date thereof. Revised Statutes, 4980; *Hill v. Henry*, 17 O. R., 9, 11 and 12.

1. As to the first point. There being no statute especially suspending the operation of the statute of limitations on the appointment of an administrator, this point must be determined by reference to the decisions of the courts on similar questions, and the statutes of this state governing the administration of estates.

In the state of New York it is expressly provided by statute that: "From the death of the decedent until the first judicial

1905.]

Liggett, Adm'r, v. Estate of Liggett et al.

settlement of an account of his executor or administrator, the running of the statute of limitations, against a debt due from the decedent to the accounting party, or any other cause of action, in favor of the latter against the decedent is suspended," and upon this statute the decisions of the Court of Appeals in *Matter of Powers*, 124 N. Y., 361, and *O'Flynn v. Powers*, 136 N. Y., 412, were leased.

In the case of *Hall, Administrator, v. Pratt et al*, 5 O. R., 73, it was decided that "where a creditor is appointed administrator to his debtor, and dies without receiving assets, it is not to be assumed that the debt was paid, nor is it extinguished." The court say, page 83, after reviewing the decision in the case of *Bigelow v. Bigelow*, 4 O. R., 147:

"The rule is different, but like that applicable to the other class of cases, it looks to the same end the attainment of justice by direct means. It is that the administrator has a right to retain what is due to him out of the assets in his hands to be administered, because he can not sue himself."

This decision followed the common law, and undoubtedly stated the law as it then was, and as it had been laid down ever since 3d, Blackstone, 18, 19, but since that decision the law has been changed in Ohio by statute. Section 6099, Revised Statutes, provides that—

"No part of the assets of the deceased shall be retained by an executor or administrator, in satisfaction of his own debt or claim, until it shall have been proved to and allowed by the probate court; and such debt shall not be entitled to any preference over others of the same class."

Under the present statutes the administratrix can not retain the assets of the estate until the claim has been allowed by the probate court, and if the claim of the administratrix is fifty dollars, or more, notice must first be given to the heirs before the probate court can allow the claim.

The Supreme Court, in the case of *Granger's Administrator v. Granger*, 6 O. R., 35, say, on page 42:

"We think it well settled, in ordinary cases, that where the statute of limitations once begins to run upon any subject, it

Liggett, Adm'r, v. Estate of Liggett et al. [Vol. III, N. S.]

continues to run to its completion, unless interrupted by some act of the party setting up the statute, which places the claim within some of the exceptions provided in the act. The death of the debtor is not such an act, and does not interrupt the running of the statute."

The same principle is upheld in *Williams et al v. The First Preb. Soc. et al*, 1 O. S. R., 478, and *Carey's Administrator v. Robinson's Administrator*, 13 O. R., 181, 196.

The statute—Section 6099 above referred to—expressly provides that the debt of the administratrix shall not be entitled to any preference over others of the same class. Now I do not believe that any one would for a moment controvert the point that if one of Mr. Liggett's creditors—other than the administratrix—had failed to present his claim to the administratrix for allowance or rejection until after it was barred by the statute, that such creditor could not recover. The duty of the creditor to present his claim to the administratrix is no stronger under our statutes than is the duty of the administratrix to present her claim to the probate court for allowance, and in my opinion where the statute points out a method for the administratrix to follow she must pursue that method, or take her chances as any other creditor.

2. As to the second point raised in the argument I need take very little time. The relation of administratrix to the estate, heirs and creditors, is not in any sense a continuing and subsisting trust. In order to bring the trust relation within the exceptions in Section 4974, Revised Statutes, as a continuing and subsisting trust, the remedy must be purely equitable. In this case an ample legal remedy prevails, so that the second point of counsel for plaintiff is not well taken. See *Yearly v. Long*, 40 O. S. R., 27, 32; *Lescallet v. Rickner*, 16 C. C., 461; *Larwill v. Burke*, 19 C. C., 449, and *Duhme v. Mehner*, 3 N. P., 266.

3. The third point raised by counsel for plaintiff is rather a novel question under the laws of Ohio, and to this I have given much study and thought.

The theory of the common law was, that a married woman was absolutely under the control of her husband, and greater

1905.]

Liggett, Adm'r, v. Estate of Liggett et al.

rights were given her than were given to infants or persons under other disabilities. Perhaps this arose from the fact that all other classes of persons under disability might be protected by the appointment of guardians or trustees, but a married woman could act only through her husband or next friend. A gradual emancipation of married women has been steadily progressing however, in Ohio, until now by statute husband and wife are equal in every thing before the law, except the right of suffrage, so that the common law rule excepting married women from the operation of the statute of limitations is wholly abrogated in Ohio.

In the case of *Ashley v. Rockwell*, 43 O. S. R., 386, the Supreme Court say, on page 389:

"The wife is always largely within the power of the husband. She may have the naked legal right to sue, and that be of little value or avail to her if he commands her to the contrary. She ought to have the right to sue after his influence, power, and command are no longer felt."

But remember that this language was used to refute the argument of the repeal of a statute *by implication*, when married women were still within the saving clause of the statute of limitations in express terms.

In the case of *Yocum, Adm'r, v. Allen*, 58 O. S. R., 280, the question was raised by counsel that: "The theory of the unity of the husband and wife known to the common law has not been abrogated in Ohio." On page 292, the court say:

"An argument of much force is presented by counsel for plaintiff upon the proposition that the common law unity of husband and wife has not been abrogated even in Ohio, and hence, on grounds of public policy, the statute of limitations ought not to be applied to a claim of the wife against the husband, and abundant decisions of the courts of other states are adduced in its support. But we do not deem it necessary to enter upon the inquiry."

This case arose upon a cause of action which was held by the court to have accrued under the statute of limitations while married women were still within the saving clause of the statute, hence it can not apply to the question now.

Let us examine the statutes of Ohio under which the cause of action in the case at bar accrued. Section 4978, Revised Statutes, was amended April 14, 1886, by omitting married women from the saving clause, and extending it only to infants, persons of unsound mind, or persons imprisoned.

On March 19th, 1887, Section 3112, Revised Statutes, was enacted, which provides:

"A husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other."

And there appears on the margin of the section in the Session Laws (O. L. Vol. 84, p. 132), the reference: "See 2 Pom. Eq., Sections 956, 1053." This reference therefore, being on the margin of the original act of the General Assembly, would naturally be looked to for an explanation of the act itself, and by reference to 2 Pom. Eq. Jur., I find that Section 956 treats of the essence and good faith of the *contracts themselves* as between husband and wife, but not as to the remedy. The principle of this section is stated in the language of the learned judge delivering the opinion in *Tate v. Williamson*, L. R., 1 Eq., 528, 536, as follows:

"The broad principle on which the court acts in cases of this description is, that wherever there exists such a confidence of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him."

And Section 1053 provides for trusts *ex maleficio*, or "where the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it un-

1905.]

Liggett, Adm'x, v. Estate of Liggett et al.

conscientious for the holder of the legal title to retain and enjoy the beneficial interest." It will be noticed that both these sections apply to purely equitable proceedings.

In Section 1099 of the same work (2 Pom. Eq.) the following principle is stated:

"In a very few states the legislation has removed the statutory separate estate of married women entirely out of the equitable jurisdiction, by conferring upon the power of making contracts in relation to it, and by rendering these contracts personally binding upon them by law, and enforceable against them personally by ordinary legal actions, pecuniary judgments, and executions."

Note 1, on page 1638, to this section says: "Equity can not, of course, deal with cases arising under this legislation," and cites: "Ohio, Revised Statutes, 1890, Section 3112, 3114." And so important does this legislation seem to the learned author that he gives the language of Sections 3112, 3114 in the notes to this section, while he only cites the legislation of other states.

The evident intent of the General Assembly being to absolutely emancipate the wife and place her on an equal footing with the husband there is, therefore, now under our statutes, as I construe them, no more authority of law for exempting married women from the operation of the statutes of limitations than there is for exempting married men therefrom.

In the case of *Hart et al v. Sarvis et al*, 3 N. P., 316, Judge Saylor of the Hamilton County Court of Common Pleas held that:

"An action will lie between husband and wife, and debts due a woman are not extinguished by her intermarriage with the debtor."

I am, therefore, of the opinion that from a fair construction of the statutes of this state the common law doctrine of the unity of husband and wife, in so far as it would apply to this case, has been abrogated in Ohio, by statute.

4. This leaves the remaining point as to the effect of the indorsement of the fifty dollars as a payment on the note by the plaintiff after the death of Gideon Liggett. If this had been

Liggett, Adm'r, v. Estate of Liggett et al. [Vol. III, N. S.]

the claim of some creditor other than the administratrix the payment made by her would clearly have prevented the running of the statute (*Niemcewicz v. Bartlett, Administrator*, 13 O. R., 271). But the language of Section 6099, Revised Statutes, is clear and positive in its character, viz:

"No part of the assets of the deceased shall be retained by an executor or administrator, in satisfaction of his own debt or claim, until it shall have been proved to and allowed by the probate court."

Section 6100, Revised Statutes, provides that if the amount of the claim is fifty dollars or more, then the same proceedings shall be had as are now before the court. If, then, the administratrix can allow a payment of fifty dollars on the claim as a valid payment so as to take the claim out of the operation of the statute of limitations, without the intervention of the probate court, this proceeding is wholly unnecessary, and the statute of no effect. From the time of day named in the indorsement on the note the plaintiff had a full half day before the expiration of fifteen years, in which to have filed her petition in this court and save her rights under Sections 4987 and 4988, Revised Statutes, by following up the filing of her petition with service of notice, and thus to have prevented the running of the statute of limitations against her claim, and, under the testimony adduced herein, have recovered the full amount of her claim. The plaintiff, therefore, by her own negligence having permitted the statute of limitations to bar her right to recover herein, I am compelled under the law, as I construe it, to reject her claim.

The claim of the plaintiff is, therefore, rejected, and judgment rendered against her as administratrix for the cost of this proceeding. The costs to be paid out of the estate.

Porter & Porter, for plaintiff.

D. W. Ayers, contra.

*NOTE: On appeal the above judgment was affirmed by the court of common pleas, and on error was again affirmed by the circuit court.

1905.]

Nellis v. Cincinnati Traction Co.

PLEADING WHERE THE DEFENSE IS MADE OF CONTRIBUTORY NEGLIGENCE.

[Superior Court of Cincinnati, Special Term.]

ROBERT NELLIS V. THE CINCINNATI TRACTION COMPANY.

Decided, December 8, 1905.

Negligence—Form of Pleading—Where the Defense of Contributory Negligence is to be Interposed—Issue not made up, Unless—Surplusage—Motion to make Answer more Definite and Certain.

1. Where, in a suit for damages on account of personal injuries, the allegations necessary to state the cause of action in no way suggest negligence on the part of plaintiff, there is no implication of negligence to be negatived, and an averment that plaintiff was without fault is unnecessary, and if made, is mere surplusage.
2. In such case the issue of contributory negligence can only be raised when pleaded as a defense, or when the testimony of the plaintiff tends to show contributory negligence.
3. It follows, therefore, that where the answer is a general denial and a plea of contributory negligence, the plea as to contributory negligence is not mere surplusage, and a motion to make this plea more definite and certain will lie.

HOFFHEIMER, J.

Heard on motion to make the answer more definite and certain by requiring defendant to specify what acts of negligence or carelessness of plaintiff caused the injuries complained of.

Plaintiff averred he was a passenger on one of defendant's cars; that the car became derailed and jumped the track while descending a steep hill at a sharp curve and was violently driven into a bluff, catching plaintiff in the wreck, severely injuring him; that said derailment and injuries were caused without fault on his part, and were due solely to defendant's negligence; wherefore damages are claimed.

The answer is (a) a general denial and (b) plea for contributory negligence.

The motion herein is directed to the general averment of negligence as set up in the plea of contributory negligence.

In resisting this motion the defendant contends that inasmuch as the plaintiff charges defendant with negligence and also avers *he was without fault*, the general denial raises two issues of fact: (1) an issue as to defendant's negligence; (2) an issue as to plaintiff's contributory negligence; and it is claimed, therefore, that the additional language in defendant's answer averring contributory negligence is mere surplusage, neither extending nor limiting the scope of the issue, and that, therefore, no motion to make more definite and certain what is mere surplusage can lie.

This reasoning is fallacious, and is evidently based on *Coal v. Estievenard*, 53 O. S., 43; and *Barrackman v. C., C., C. & St. L. Ry. Co.*, 1 N. P.—N. S., 237.

The report of the last mentioned case does not, however, set forth the facts upon which the action was founded, but the court follows *Coal Co. v. Estievenard*, which was a case involving the relation of master and servant. In that case it appears that the answer was a general denial, and the court charged on contributory negligence. Whether this was done because the issue as to the negligence of plaintiff was joined on a general denial, or whether the evidence justified such a charge is not clear. At any rate, at p. 51 of *Coal Co. v. Estievenard* the court in its opinion said:

"The defense to the action rested principally upon the application of the doctrine of contributory negligence. The plaintiff avers in his petition that he was without fault or negligence in the premises. This allegation is denied in the answer and thus the issue is fairly joined upon the question of negligence on part of plaintiff below. While the issue as to plaintiff's contributory negligence is thus made up by the averment of the petition and denial in the answer, the course of the trial and proof remained the same as if the answer had averred contributory negligence and the reply had denied the same."

Recently in *Traction Co. v. Forrest*, Vol. 3, O. L. R., 34 (Supreme Court Supplement, p. 12), the Supreme Court has laid down the rule that—

"Where in a suit to recover for personal injuries occasioned by the alleged negligence of the defendant, the petition, after

1905.]

Nellis v. Cincinnati Traction Co.

stating the facts upon which the plaintiff bases his action, avers that the plaintiff *was free from fault* and the answer is a *general denial*, there is no issue of contributory negligence; and where, in such case, the testimony introduced by the plaintiff does not tend to show contributory negligence, it is error for the court to introduce the element of contributory negligence in its charge to the jury and give instructions thereon."

Whatever theory the court may have proceeded on in *Coal Co. v. Estievenard*, whether it was because the issue of contributory negligence was deemed proper, inasmuch as the general denial joined the issue on negligence, or whether it was (and this would seem to be the true reason) because the plaintiff's evidence warranted the charge, it seems immaterial. If it was for the former reason, the rule is abrogated by *Traction Co. v. Forrest*. And even if that were not the case, the averment in the petition under consideration, that plaintiff was without fault, was an unnecessary averment, as the averment necessary to state the cause of action in no way suggested the implication of negligence and, therefore, there was no implication of negligence to be negatived. The general denial does not raise any issue of plaintiff's negligence, and if it is desired to raise the issue of plaintiff's contributory negligence, that issue, as we have seen, can only be raised (a) when pleaded as a defense; (b) when the testimony of the plaintiff tends to show contributory negligence. See also *Street Ry. v. Nolthenius*, 40 O. S.; 376-380.

So much for defendant's general denial.

As to the part of defendant's answer which states "that if plaintiff sustained injuries, they were directly due to the negligence and carelessness of the plaintiff," this is not, as defendant claims, mere surplusage. Indeed, if defendant intends to rely on any negligence of plaintiff as being *contributory*, as matter of defense, is becomes a necessary allegation. But this plea of contributory negligence as thus set out in defendant's answer, it will be noted, does not state any act on plaintiff's part that caused the injury, nor does it state that any act was negligently done by plaintiff. In other words, no specific facts or acts of omission or commission are alleged. This, in effect,

is simply pleading a general averment of plaintiff's negligence. If in an action for negligence a petition were framed so as to contain a general charge of negligence merely, while it would probably be proof against demurrer, it would nevertheless be subject to motion for indefiniteness (*Railway Co. v. Kistler*, 66 O. S., 326). Why, therefore, should not the same rule be applicable to a general averment of negligence set up as a substantive defense? Surely the plaintiff is as much entitled to know the charge he must meet as is the defendant to know what he must answer.

In *McInerney v. Chemical Co.*, 118 Fed., 653, the syllabus reads:

"Under the rule of code pleading that the facts relied on be stated in a clear and concise manner, an answer that the injuries causing the death of plaintiff's intestate arose from his carelessness, negligence and fault may be required to be made more definite and certain."

At page 64 of the same act it was said substantially—

"This practice (setting up general averments only) which has gone unchallenged, if tested by the rules of code pleading, will be found defective. Where the defendant sets up the defense of contributory negligence he, in effect, by inserting the same introduces new matter; other facts which if they be not justified may debar the plaintiff, and under the rule of code pleading he must set out concisely these facts. To put it in another way: If defendant wishes to rely on the rule that plaintiff must prove his case, the general denial would be sufficient, but if he attempts to go beyond this and avail himself of a defense of contributory negligence, he must show his facts upon which he relies and from which negligence could be inferred."

Section 5088 of the Revised Statutes of Ohio provides when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. As said by Burket, J.:

"This means that the court shall in a proper case require the pleading to be made definite and certain. It was not a mere

1905.]

Durack, Adm'x, v. Cincinnati Traction Co.

matter of discretion. It is a substantial right to a party to have the pleadings against him so definite and certain as to enable him to know what he has to meet and to prepare his evidence accordingly."

In view of the foregoing the motion must be granted.

Guido Gores and Charles M. Cist, for the motion.

H. Kenneth Rogers and Ellis G. Kinkead, contra.

MAGGIE DURACK, ADMINISTRATRIX, v. THE CINCINNATI TRACTION COMPANY.

SWING, JAS. B., J.

Memorandum opinion filed in the Common Pleas Court of Hamilton County, December 15, 1905.

This case is submitted upon a motion to make the answer more definite and certain. There is in the answer an allegation in general terms of contributory negligence. It is sought to have defendant required to "set forth more particularly wherein the plaintiff's intestate was guilty of negligence." Since the motion was submitted to me the superior court (Hoffheimer, J.) *supra*, has decided the same question in a written opinion which is quite clear and forcible, sustaining the motion. In that opinion it seems to be shown that, as is said in 5th Ency. of Pleading & Prac., page 12, "*the trend of the authorities is that a general averment that the plaintiff was guilty of negligence which contributed to the injury, and that he could have avoided all damage by the exercise of proper care, is not sufficient; that the acts constituting such contributory negligence should be averred.*" This is said as to states "where it is incumbent on the defendant to plead contributory negligence specially and where the defense can not be made under a general denial." Since the decision of our Supreme Court in *Cincinnati Traction Co. v. Forrest*, decided October 31st, 1905, *Ohio Law Reporter*, Vol. 3, No. 34, page 12, Ohio must be said to be one of these states. The decision of Judge Hoffheimer seems to be in accord with

Durack, Adm'x, v. Cincinnati Traction Co. [Vol. III, N. S.]

the statement of the law in *The N. Y., Chicago & St. L. Railroad Co. v. Kistler*, 66 O. S., 326, as follows:

"When the allegations of a *pleading* are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, and a motion is made to require such *pleading* to be made more definite and certain, it is error to overrule such motion."

In that case the court say, page 332, quoting the statute as above:

"This means that the court *shall in a proper case* require the *pleading* to be made definite and certain. It is not a mere matter of discretion. It is a substantial right to the party," etc.

The Kistler case was one for damages for personal injuries caused by negligence. It is said in the syllabus:

"In an action founded upon negligence, the *petition* should state the acts of commission or omission which the plaintiff claims to have caused the injury."

Should a different rule be applied to the answer? I have thought that *possibly* a different rule *might* with reason be applied to the answer in such a case, see 1 N. P.—N. S., 237 (Belden, J.), but in the face of the manifest "trend of the authorities" beyond our state, and "the trend," as I understand it, of our own Supreme Court on the subject, and in view of the forcible reasoning of Judge Hoffheimer in the case referred to, I do not feel warranted in so holding. I do not feel warranted, under the circumstances, in applying to the answer in such cases a rule different from that applied in the petition. I do not feel warranted in saying that a general allegation of contributory negligence in an answer, does not present "*a proper case*" for the application of the rule stated in the Kistler case, as well as does an allegation of negligence in the *petition*, both being *pleadings*. Without saying that some such distinction might not with reason be made, I simply do not feel warranted in making it. The motion is therefore sustained.

Walter A. DeCamp and D. V. Sutphin, for the administratrix.
E. G. Kinkcad, contra.

1905.]

In re Clara Lee.

POWER OF COURT OVER SENTENCE AFTER TERM.

[Common Pleas Court of Franklin County.]

IN THE MATTER OF THE APPLICATION OF CLARA LEE FOR A WRIT
OF HABEAS CORPUS.

Decided, October 6, 1905.

Suspension of Sentence—Pardoning Power and Power to Respite—Judicial Discretion in Revising, Suspending or Revoking the Suspension of Sentence—Criminal Law—Habeas Corpus.

In the absence of a statutory enactment to the contrary, the power of a court to suspend execution of sentence during good behavior, or to revoke such suspension, is not impaired or limited by the passing of the term in which the suspension was made.

DILLON, J.

The applicant was convicted in the police court of this city on the 7th day of April, 1904. The judge of that court, however, suspended execution of the sentence during good behavior. At a subsequent term of said court, to-wit, on the 30th day of August, 1905, the court finding that she had violated the conditions imposed, revoked the suspension and sentenced the accused to the workhouse.

By statute, the police court is considered as holding monthly terms, each commencing on the first Monday of the month. The question, therefore, is squarely presented as to whether or not a court has power to sentence at a term subsequent to conviction.

In the case of *Webber v. The State*, 58 Ohio St., 616, the court settled one phase of the question by announcing that a court in a criminal case has the power to suspend the execution of a sentence in whole or in part, unless otherwise provided by statute. And further, that such court had the power to set aside such suspension at any time during the term of court at which sentence was passed.

But the question here presented was disposed of by said court in this language: "Whether such suspension can be set aside at a subsequent term is not decided." The authorities in the various states passing upon this question are in conflict. In the case of *Weaver v. The People*, 33 Mich., 295, the court denied

the right of any court to sentence an offender at a subsequent term, where the judge holding the court was not the same judge who made the original suspension.

But in the case of *People v. Reilly*, 53 Mich., 260, the court held:

"Suspending sentence for a reasonable time is discretionary with the judge, if a cause is shown for doing so; but an indefinite suspension lasting for about nine months is unreasonable, though it is not necessarily ground for setting aside the conviction."

Whatever doubt was left upon the subject in the state of Michigan, however, was set at rest a little later by the case of *People v. Brown*, 54 Mich., 15, where the court in the 5th syllabus holds as follows:

"The pardoning power in Michigan belongs to the governor alone; no judge can exercise it by indefinitely suspending the sentence of a convicted criminal."

This same contention finds further support in the case of *United States v. Wilson*, 46 Fed., 748, wherein the Circuit Court of the United States for the District of Idaho held that courts have no power to suspend sentence, except for short periods pending the determination of motions or considerations arising in the cause after a verdict. It is noteworthy that that court cited all three of the Michigan cases *supra*.

In the case of *Williams v. The Commonwealth*, 29 Pa. St., 102, the defendant was convicted of murder in the first degree, at the regular term, and adjournment was taken in accordance with the statute, for the convenience of the court, pending his decisions upon certain motions, and the court held that the accused might afterwards be legally sentenced at an adjourned term.

In the case of *State v. Watson*, 95 Mo., 411, the court held that the sentence of one convicted of an offense might be postponed until a future date or term to suit the convenience of the court or for cause shown, but in this case, which has been cited by counsel, it will be observed that it was not a case of a suspended sentence on condition, but was made necessary for the convenience of the court in passing upon a motion for a new

1905.]

In re Clara Lee.

trial. The only value of this decision is to show that a failure to pronounce sentence at one term will not prevent the court passing sentence at the subsequent term.

In the case of *People of New York v. Graves*, 31 Hun. (N. Y.), 382, the court suspended sentence during the defendant's good behavior, and he was allowed to leave the court. Over two years later for some misconduct he was taken before the same court, and on motion for sentence against him upon the old crime, he was sentenced to the penitentiary for two years and six months. On application for writ of habeas corpus, the court sustained the action of the court. In that case, the court said:

"Such power to pronounce sentence was properly exercised and the judgment entered thereon, is regular and binding upon the accused. It does not lie in his mouth to say that he deserved and ought to have received sentence earlier."

In the case of *People v. The Court*, 141 N. Y., 288, it is held that a statute which authorizes courts of criminal jurisdiction to suspend sentence after conviction, is not violative of the provisions of the state Constitution, which gives to the governor the power to grant reprieves and pardons.

Without quoting further it may be pertinent to observe that the theory of the courts which have denied the right to enforce sentence at a term subsequent to the conviction, is not based upon the time of the sentence, but has for its chief support and argument the fact that it is delegating to the judge the power to exercise parole and pardon in violation of the fundamental law of the state. These cases seem not to have observed that it already lay in the power of the same courts to discharge the prisoner at will at the conclusion of the state's evidence or if the verdict of the jury was not satisfactory, to set it aside. So far as the general object and purpose is concerned, it must be readily granted that the exercise of such discretion upon the part of the court is intended to accomplish much good and under certain circumstances should be favored. Nor will it be claimed that the exercise of this power by the courts has ever been indulged in to such an extent as to present a vice. It should further be noticed that in case such inherent power of the court should be restrained, it should be so done, as sug-

gested in the case of *Webber v. The State, supra*, by legislation.

This inherent power of the court is recognized in the case of *Lec v. The State*, 32 Ohio St., 113, in which it is held that where the court in passing the sentence, has acted under a misapprehension of the facts, it may, in the exercise of judicial discretion and in furtherance of justice, at the same term and before the original sentence has gone into operation, revoke, revise, increase or diminish such sentence within the limits prescribed by law.

The inherent power of the court to suspend sentence during good behavior having been established as law in this state, it must be conceded that if there be a limitation of time upon the suspension, it must be based on some technical and not on a substantial reason. Under such contention we would have the anomaly of a court at the beginning of a four months' term of court suspending sentence during good behavior for a period of four months, while a like criminal under like circumstances and conditions who comes before him on the last day of the term could have no suspension of sentence. Moreover, a sentence during good behavior would mean absolute pardon at the end of the term, unless the court in violation of his own condition of suspension should feel compelled to enforce sentence at the end of the term rather than take chances upon the accused's good behavior thereafter—in the one case an injustice to the state, and in the other an injustice to the accused. I refer counsel to the discussion of this subject in 19 Enc. of Pl. & Pr., 446 and 452; and also to 25 A. & E. of Law, 2d Ed., 313.

From a consideration of the conflicting authorities upon this subject and upon reason, my conclusion is that in the absence of statutory enactment to the contrary, the power of the court to suspend execution of sentence during good behavior is not impaired or limited by the passing of a term in which such suspension is made. The prisoner will be remanded and the writ denied.

M. B. Earnhart, for plaintiff.

J. M. Butler, for defendant.

1905-6.]

Cincinnati Traction Co. v. Holzenkamp.

INJURY TO ONE ABOUT TO TAKE A STREET CAR.

[Superior Court of Cincinnati, General Term.]

THE CINCINNATI TRACTION COMPANY V. ANNA HOLZENKAMP.

Decided, November 2, 1905.

Negligence—Liability of Street Railway Company to Intending Passenger—Injured Before Coming in Actual Contact with the Car—By the Falling of a Broken Trolley Pole—Implied Assent of Company to Carry—Constructive Control Over Waiting Passenger.

1. A street railway company is bound to exercise the same high degree of care toward an intending passenger as toward one who has entered a car and paid his fare, where such intending passenger, having taken his place at a point designated for receiving passengers, is injured after coming within the sphere of peril from the car, but before actual contract with it.
2. H, when about to step upon a car which had stopped for passengers, was injured by the fall from the roof of the car of a broken trolley pole. *Held:* That so far as the liability of the company was concerned, H had become a passenger.

FERRIS, J.; CALDWELL, J.; concurs; HOFFHEIMER, J., dissents.

The plaintiff below brought an action against the defendant to recover damages by reason of the wrongful act of the traction company in negligently causing an injury to her under the following circumstances:

Desiring to take passage on the Harrison avenue line, near Westwood, the present defendant in error approached a car at a street crossing, the car having been signalled to stop, and while about to take passage on the car at a place where it was accustomed to stop, was struck by a trolley pole that fell from the car of the defendant company.

The testimony shows that the injury complained of, happened to her as set forth in the plaintiff's petition while she was waiting at a place designated to receive passengers. The plaintiff's contention was that she was injured while "in a sphere of peril" incident entirely to her position, waiting at the crossing of the

*Affirming *Holzenkamp v. Cincinnati Traction Co.*, 2 N. P.—N. S., 157.

streets, solely for the purpose of taking passage on the defendant's car. Her claim was that, for all purposes of relief, she was a passenger. The defense rested upon matters which were in mitigation and the testimony was directed toward arriving at a minimum sum of damages, and did not attempt to escape liability, but was content to have the entire case submitted on the question: "Was the plaintiff a passenger?"

The traction company, therefore, complains of the following charge to the jury on the ground that it holds the traction company to a higher degree of care than they are chargeable with, the defendant in error not being in law a passenger at the time of the accident.

The charge excepted to was as follows:

"If the jury finds from the testimony that the plaintiff had gone to the corner of Franklin avenue and Harrison avenue, and that thereupon the car of defendant came to said point and stopped for the purpose of taking the plaintiff aboard as a passenger, and that it was at a point near a corner where the cars of the defendant were in the habit of stopping to take on passengers, and that plaintiff was standing in the street adjacent to and by the car track along which the car came, going to the city, and that plaintiff intended to get on the car and was about to do so, and the car stopped at the point where she was standing to enable her to do so; and if the jury find that just as the plaintiff was about to step on the car she was struck by the broken or falling trolley, then I charge you, that for the purposes of this case, plaintiff was a passenger on the car, and if the plaintiff was then and there struck and injured by the trolley breaking and falling upon her from said car, that a presumption arises in the absence of other proof that the traction company was guilty of negligence."

This charge raises all of the questions of law that are excepted to by counsel for plaintiff in error, except the one wherein the verdict is complained of as being excessive.

Contention was had that the plaintiff was not a passenger within the meaning of the law; that such relation exists only by contract with a common carrier, and begins *when one has entered the car and pays his fare*, when the contract of carriage is complete, the common carrier agreeing thereby to transport

the passenger in safety to his place of destination, and allow him a reasonable time to alight.

Under the testimony it would have been admitted that the plaintiff in error could not have escaped liability had the injury occurred to a person thus a passenger, but the facts in the case show that the plaintiff had not actually entered the car, but was "about to step upon the car" when the injury occurred.

Does one in such position become a passenger entitled to that high degree of care that is incumbent upon a common carrier charged with the duty of exercising the highest degree of care toward those who become passengers?

In a well considered case in 40 Barb., 546 (*Gordon v. Railway*), it was early decided that neither an entry into the cars upon a railroad, nor the payment of fare, was essential to create the relation of carrier and passenger. To the same effect is the case of *Hazelton v. Railway* in 71 N. H., 589, a case bearing a striking analogy to the case at bar. The court held that one who intended to become a passenger walking alongside the car and stepping off the walk or platform and sustaining injury thereby, was to be considered as entitled to the same degree of care as though fare had been paid and she had thereby become a passenger.

It has been held that "physical contact with the car was not necessary to constitute the plaintiff a passenger and entitle him to the care due that relation." 86 Me., 261.

And the court attempting to define the duty of a common carrier in *Hazelton v. Railway*, *supra*, said physical contact with the car was not necessary to constitute the plaintiff a passenger and entitle him to the care due that relation, citing *Rogers v. Steamboat Co.*, 86 Me., 261; *Allender v. Railroad Co.*, 25 L. R. A., 491; *Smith v. Railroad Co.*, 37 Ia., 264; Elliott on Railroads, 2460; Booth on Street Railroads, Section 326; Joyce on Elec. Law, 528.

An interesting case, elaborating the principle that was contended for by the plaintiff below, is referred to by the trial judge, quoting from 191 Pa. St., 102, wherein is made plain the principle upon which the defendant company was held to be

liable. The syllabus of the case, while not presenting the facts in this case, indicates plainly the principle involved.

"Where a person is given a transfer ticket from one electric car to another which is a block distant, to enable him to reach the destination for which he has paid, and while in the car way approaching the second car which is the proper car for him to take under the terms of the transfer, he is struck within five feet of the car by a piece of the trolley pole which broke while the conductor was turning it from one end of the car to the other, such person is a passenger and is entitled to recover damages for the injury sustained, if the railroad company is unable to show the extraordinary care which it owes to a passenger."

The case turned upon the question whether the court below was right in charging on the undisputed facts that the plaintiff at the time of the injury received was a passenger. As in the case at bar, the court there announced, as a proposition of law, that the defendant owed to the plaintiff, a passenger, extraordinary care, and then submitted to the jury the evidence to determine whether it had exercised toward her the care required (p. 111). The defendant below—

"* * * offered no evidence as to the strength of the trolley pole; whether it had been subject to inspection at any time; whether age and constant use had destroyed the tenacity of its fibre; or even whether it was ever safe for its purpose. The fact stood out undisputed, that in manipulating the pole in the usual way, it broke and injured the plaintiff. Unquestionably (says the court), defendant failed in its duty to her if she was a passenger."

And then proceeding to show that she did occupy that position, the court says:

"* * * the carrier is not answerable for the condition of the highway on which the passenger alights, or from which he stands or steps before entering the car; nor is it an answerable for the conduct of third persons, who by neglect cause injury in such situation to the passenger. But in the case of these particular conveyances, electric cars, necessarily and immediately, on the car stopping at the end of the route, the motor-man proceeds to reverse the trolley; ordinarily this is attended with no danger to any one; the act is performed while some

1905-6.]

Cincinnati Traction Co. v. Holzenkamp.

of the passengers have alighted and are on the sidewalk out of the reach of the trolley pole; some are between the curb and the car, and probably some yet in the car. Can it be urged with any plausibility that in changing the trolley pole the carrier owes no duty to its passengers who are not out of reach of danger from a part of the very vehicle in which they have been carried? Clearly, the duty of the passenger under such circumstances, with that kind of vehicle, does not end the moment the passenger's foot touches the street. And so with the next starting car: * * * The car moves up to the end of the line in front of her and stops; she steps outside the curb and moves toward it; the seats are being reversed; two or three passengers are already in the car; when within four or five feet of it she is struck by the broken pole, which of necessity is being changed. Why is she within reach of this peril? She is not a traveler on the highway, is not a resident who desires to cross the street; is not a mere spectator who from curiosity or idleness stands in that situation with reference to the car; she is there because under the stipulations of the contract then in her possession, *she has a right to take passage on that particular car at that point*. In no sense is she one of the general public on the highway. * * * If it were not for her contract she would not be there at all. Surely, in such a situation under such circumstances, the carrier's duty to her was what it owed to a passenger, as much as if her injury had been caused by a rotten step on the car. *When she came within reach of the vehicle provided for her transportation the carrier's duty was that she should not be injured by the vehicle, if the highest degree of care could prevent it*. Such care appellant was bound to show affirmatively; it did not attempt to show it. Therefore, it is answerable in damages for her injury." *Susan Keator and J. B. Keator, her husband, v. The Scranton Traction Company*, 191 Pa. St., 102.

Justice Holmes in the case of *Henry A. Gordon, Administrator, v. The West End Street Railway Company*, decided that a person is a passenger if a street car has stopped for him and he is in the act of getting aboard when the car stops. And on page 183, in 175 Mass., concurring in the opinion of the court below, said:

"The judge was right in his ruling as to the deceased being a passenger. He was a passenger if the car had stopped for him and he was in the act of getting aboard when the car

started." Citing *Warren v. Fitchburg R. R.*, 8 Allen, 227; *Brand v. Bennett*, 8 C. & P., 744; *Ganiard v. Rochester City & Brighton R. R.*, 50 Hun., 22; s. c. 121 N. Y., 661; *Smith v. St. Paul City Ry.*, 32 Minn.

This is in accordance with what we believe to be sound authority and abstract justice, and we, therefore are of opinion that the judgment should be affirmed. The damages found by the jury are not, under the circumstances, excessive, and for these reasons, the judgment will be affirmed.

Outcalt & Foraker, for plaintiff in error.

Charles W. Baker, for defendant in error.

HOFFHEIMER, J., dissenting.

In my opinion the record does not disclose facts that justify the assumption that defendant in error was a passenger; a charge permitting the jury to so find was therefore prejudicial error.

I concede that actual physical contact with a car by the intended passenger, is not always necessary to establish the relation of carrier and passenger. *Hazelton v. Ry.*, 71 N. H., 589; *Gordon v. Grand St. Ry.*, 40 Barb., 546; *Barth v. Kansas City Ry. Co.*, 142, Mo., 535; *Exten v. Centry Ry. Co.*, 63 N. J. Law, 356.

The underlying principle of these cases is, however, *implied assent* to carry the intending passenger, or constructive control over him; as, for example, where a person is injured at the company's station, or on a platform designed for the accommodation of the waiting passenger; or where the passenger was going from one car to another, *with a transfer in his hand* (*Keator v. Traction Co.*, 191 Pa., 102).

The facts in the case before us are not within these cases. If the car did not stop (and this is disputed by plaintiff's own testimony), I think plaintiff failed to affirmatively show a state of facts, tending to show any assent, actual or implied, to receive her as a passenger. On the contrary the evidence tends to show stoppage for another reason. (The car was coming around a "Y" and was changing to the main feed wire when

1905-6.]

Cincinnati Traction Co. v. Holzenkamp.

the accident occurred). There is no testimony that the motor-man or conductor were signalled to stop, although a witness did say on cross-examination that she (the witness) signalled the car to stop. This is not sufficient.

In *Schepens v. Union Depot Ry. Co.*, 126 Mo., 665, a man ran towards a car with his hand raised, but there was no evidence that the signal was seen by those in charge of the car. The court said:

“He could not in this manner, by his own act alone, constitute himself a passenger, and thus secure the high degree of care due from a carrier to a passenger.”

In *West Chic. St. Ry. Co. v. Binder*, 51 Ill. App., 420, a boy of twelve *put up his hand as a signal* for a cable car to stop. There was no evidence that the gripman saw the boy. The boy ran towards the car, *which slackened its speed*; he caught hold of the rear platform, when a sudden increase in speed, threw him, and he was run over and killed. *Held*: Not a passenger.

To establish the relation of passenger and carrier, there must be at least an offer and request to be carried on one side, and an acceptance by the other. *Shear. & Redf. on Neg.*, 4th Ed. par. 488; *Patterson Ry.*, *Acc. Law*, 210, 214.

No offer or request was brought home to the company, and the jury could not have found an acceptance on its part.

Outside of the cases cited, *supra*, to enable a person to claim the relation existed, *where no actual physical contract took place*, it ought to appear *that the car stopped for the purpose of enabling the intended passenger to enter, in response to her signal*. *Booth on St. Rys.*, par. 326; cited approvingly in *Smith v. Ry. Co.*, 32 Minn., 1; *Baltimore v. State*, 28 At. Rep., 397.

The record fails to show this to be the fact.

CHANGE IN COMPENSATION DURING OFFICIAL TERM.

[Common Pleas Court of Franklin County.]

THE STATE OF OHIO, EX REL TAYLOR, v. WILLIAM S. CARLISLE
ET AL.

Decided, April 26, 1905.

County Commissioners—Compensation for Services of—Provisions of Act of 1904—Applicable to Commissioners in Office at Time of Its Passage—Constitutional Inhibition against Change in Salary During Term—Not Effective, When—Office and Officer—Injunction.

1. The constitutional inhibition against the increase or diminution of the salary of an officer during his existing term does not render it incompetent for him to accept compensation, fixed by the General Assembly after he entered upon the discharge of the duties of his office and before the expiration of his term, where no compensation was theretofore provided.
2. County commissioners, whose salaries were fixed by statutes declared unconstitutional during their terms of office, were left in the position of an officer for whom no compensation had been provided; and can not be enjoined from receiving the pay provided by the act of April 21, 1904, notwithstanding the rate is higher than they previously received under the unconstitutional statutes in existence at the time they came into office.

EVANS, J.

The question of law raised by the demurrer to the amended petition is whether the defendants as county commissioners of this county are entitled to be compensated as such under Section 897, Revised Statutes, as amended by the act of April 21, 1904 (97 O. L., page 254).

Said three defendants as such county commissioners were incumbents in said office at the time of the passage of said amended act of April 21, 1904, and each of them had theretofore demanded and received compensation for services as such under the provisions of Section 897, Revised Statutes, prior to its repeal and amendment on April 21, 1904.

The salary provided for county commissioners in counties of the population of Franklin, under said Section 897, Revised

1905-6.]

State, ex rel, v. Carlisle et al.

Statutes, as is existed at the time said defendants took office and under which they were compensated until the passage and taking effect of said amended act, was \$1,200 per annum each, together with certain traveling expenses when traveling outside the county on official business. They were, in addition, allowed and received \$800 per annum each, under Section 897b, Revised Statutes, for expenses incurred in the proper discharge of their duties within said county. Under said two sections of the statute they were thus allowed and paid \$2,000 per annum each, and in addition were allowed and paid for traveling expenses when traveling outside the county on official business. Under the amended act of April 21, 1904, no definite sum as compensation is fixed, and it is determined each year in the several counties of the state by the aggregate of the tax duplicate in each county for real and personal property, and is not less than \$750 per annum, and not greater than \$3,500 per annum. If the tax duplicate is five million dollars or less the compensation is \$750 per annum, and three dollars on each full one hundred thousand dollars of the amount of such duplicate in excess of said sum of five million dollars. This provides for the full compensation for all services rendered, except in counties having ditch work, and no provision is made for any additional sum for expenses.

Under this amended act the compensation for each county commissioner in Franklin county for the current year, according to the aggregate of the tax duplicate on the 21st day of December last, would be about \$3,400. It is apparent that if said defendant commissioners are permitted to receive compensation for their services under said amended act that such will amount to an increase of about \$1,400 per annum each over that provided by the repealed sections which were in operation at the time defendants took office and under which they received compensation for their services.

It is claimed that said defendant commissioners can not take under said amended act because such is inhibited by Article III, Section 20, of the Constitution of Ohio, which provides:

“The General Assembly, in cases not provided for in this Constitution shall fix the term of office and the compensation of all

officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Ordinarily it is not difficult to apply this constitutional provision to a given case. The difficulties in this case arise from a consideration of the question as to whether there is any valid law existing in this state, other than said amended act of 1904, providing compensation for the services of said defendant commissioners.

Both the original Section 897, Revised Statutes, and Section 897b, Revised Statutes, are unconstitutional and void. They are special legislation containing subject-matter of a general nature, and come within the class of cases in which such legislation is held to be repugnant to the Constitution *State v. Yates*, 66 O. S., 546; *State v. Garver*, 66 O. S., 555.

But it is contended that conceding that said sections of the statutes are unconstitutional, that the question of their constitutionality can not be raised by these defendants. This is on the ground that they could not after having taken their salary under these acts come in now and attack them on constitutional grounds.

This is no doubt true. But these sections of the statutes have heretofore been adjudged unconstitutional by this court in another proceeding, and these defendants enjoined from drawing salary under said acts. *State, ex rel, v. Carlisle*, 50 Bull., 287.

This would leave these defendants in a situation in which they could receive no salary or compensation whatever for their services, unless they can take under the amended act of 1904.

It is clear that there is no valid law in the statutes providing compensation or salary for county commissioners, except the late act of April 21, 1904. And these defendants have been enjoined from drawing salary under said unconstitutional acts. They are then in the situation of one holding an office and performing the duties in which no provision for salary therefor had been made until after he had qualified and entered upon the duties of the office. Would it be constitutional for an incumbent in office for which no salary or compensation was provided when his term began to take the salary enacted for such office after the beginning of his term but before it ended?

I am inclined to the opinion that such would not be within the inhibition of the said constitutional provision, unless such was prohibited and not made a condition of the acceptance of the office. There are many authorities of great weight in support of this holding.

The court say in *State, ex rel, v. Kennon et al*, 7 O. S., 559:

“That compensation or emolument is a usual incident to office is well known; but that it is a necessary element in the constitution of an office it not true.”

The court further say in this case, that where an office is created providing for no fees or salary for the incumbents, but not providing that hereafter compensation to them shall be prohibited or precluded, and such is not made a condition of their acceptance, there is nothing to prevent them applying for compensation to the Legislature and nothing to prevent that body from awarding it.

In *Rucker v. Supervisors*, 7 W. Va., 661, it is held—

“That in order that a constitutional or statutory provision forbidding the increase or diminution of an officer’s compensation should apply to a particular officer’s compensation, it is necessary that such compensation should have been definitely fixed before the passage of the statute purporting to make the change.”

The statute of West Virginia provided that the supervisors of every county shall annually allow to the prosecuting attorneys not less than \$100, nor more than \$600. In the above case the supervisors reduced the salary during the incumbency. The court held that as he was not paid by a fixed salary prescribed by law, the act forbidding an increase or decrease was valid.

State v. McDowell, 19 Neb., 442, was a case in which at the time of relator’s election no salary or compensation had been fixed for the services of that officer. During his incumbency his salary was fixed at \$300 per annum. The court held the act valid—

“That as there was no salary fixed, the act providing for such after his election was not an act either increasing or decreasing the salary.”

The same ruling was held in *Purcell v. Parks*, 82 Ills., 346. See *Mechem on Pub. Officers*, 858.

The reason for the above holding is, that if there is no salary definitely fixed, or if no salary whatever has theretofore been provided, then there is no salary to increase or diminish by an act providing for a salary during an incumbency.

Our Constitution provides, "No change therein shall affect the salary of any officer during his existing term." If there is no salary at all, or none definitely fixed, then legislation providing a salary during his term could not affect any change, for there is none existing to affect.

Another consideration of this question is whether the amended act of 1904 provides for a salary such as comes within the inhibition of said Article II, Section 20 of the Constitution.

The act does not provide for any definite fixed salary. The compensation depends on the aggregate of the tax duplicate from year to year. It may be less one year and greater another, depending on the variation of the tax duplicate, and the amount from one year to another can not be determined until December of each year when the aggregate is ascertained.

Our Supreme Court has held in *Thompson, ex rel, v. Phillips*, 12 O. St., 617, that—

"Where the compensation is to be ascertained by a percentage on the amount of money received and disbursed, it is not a salary within the meaning of the section of the Constitution."

The court further say, "The word salary was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services, a payment dependent on time, and not on the amount of services rendered." In addition to the fact that the compensation provided is dependent on the aggregate of the tax duplicate, and may vary in its amount from year to year, the act makes a further allowance of \$3 per day for services in counties where ditch work is carried on by the commissioners, so that the compensation is dependent upon the amount of services rendered rather than upon time.

The conclusion I have reached is that there is no salary law in the state for county commissioners other than the amended act of

1905-6.]

Estate of Anthony Ferguson, Deceased.

April, 1904, under which these defendants could be compensated for their services, and that it is within the province of the Legislature to enact a law providing for compensation for a public officer, under which an incumbent in office, under the circumstances of this case, would be entitled to take the compensation therein provided.

The demurrer to the amended petition is sustained and the petition is dismissed at plaintiff's costs; exceptions.

Seymour, Webber & King, for plaintiff.

Sater & Sater, for defendants.

PROCEEDINGS ON ERROR TO THE PROBATE COURT.

[Common Pleas Court of Hamilton County.]

ESTATE OF ANTHONY FERGUSON, DECEASED; AND J. M. FERGUSON, ADMINISTRATOR, V. N. S. FERGUSON ET AL.

Decided, December, 1904.

Probate Court—Jurisdiction of—Affirmative Evidence to Indicate Not Necessary—Facts Which Are Not Jurisdictional—And Which Need Not Appear in the Journal Entries—Error Does Not Lie to Order Removing Administrator—Two Decrees to Sell Not Prejudicial. When.

1. Probate courts are courts of record, having general jurisdiction within the sphere of the subject-matters assigned to them by the Legislature; their orders and decrees import absolute verity and require no affirmative evidence to indicate such jurisdiction.
2. The following are not jurisdictional facts: The reasons for the removal of an administrator under Section 6017, Revised Statutes; the qualification of his successor under Sections 6005 and 6018; the latter's failure to file a complete statement of the value and nature of the estate to be administered; and in actions to sell real estate—that evidence was heard therein finding it necessary to sell. Nor is it necessary that such facts affirmatively appear in the journal entries to sustain their regularity in proceedings on error.
3. Although error may be prosecuted to an order denying the right of certain persons to administer an estate, under Section 6005,

this can not be done on an order removing an administrator under Section 6017.

4. A party is not prejudiced by two decrees to sell, one ordering an appraisement and the other an upset price, especially if the sale realizes more than two-thirds of the appraisement and more than the upset price fixed by the court.

PFLEGER, J.

On error from the probate court.

These are two proceedings in error brought by J. M. Ferguson et al against Amor Smith, Jr., et al, to reverse an order of the probate court removing the original administrator and appointing a successor, and an order to sell real estate to pay debts.

The plaintiffs in error claim that these orders, made three years prior thereto, were determined by the court without jurisdiction, and that although this action is a direct proceeding, they can attack the same collaterally. They also insist that there was error in the court below in confirming the sale made under such prior order of sale. Not only is error claimed in the action taken by the lower court, but want of jurisdiction is pleaded in making the journal entries.

Jurisdiction does not depend upon the regularity of the exercise of that power nor upon the rightfulness of the decision made. The authority to decide a case at all and under the decision rendered therein is what makes up jurisdiction. When there is jurisdiction of the parties, the subject matter, the *res* (the property involved) and there is authority of the court to enter the judgment in the particular case, which it assumes to make, the wrongful exercise of that jurisdiction does not affect the jurisdiction itself, but the regularity of the proceedings. Irregularity can only be questioned in a direct attack by proceedings in error. If the constituent elements of jurisdiction above recited are not all present, then the action taken by the court is absolutely void and is a mere nullity, and consent or acquiescence (except when it is confined to a question affecting the person) will not validate or give life to such void proceedings. A void proceeding can, of course, be attacked collaterally. The plaintiffs in error have a standing in court to set aside either an ap-

1905-6.]

Estate of Anthony Ferguson, Deceased.

pointment or a sale made without jurisdiction, and if the action taken by the court below was made with full jurisdiction, they may directly attack the same in this proceeding, if they have proceeded formally. These questions are elementary, requiring no citation of authority. It may be uncertain at times to determine the class within which the particular defect complained of falls, but we have no such difficulty in the case at bar.

Within the sphere of the subject matters given to the probate court by the Legislature, it is a court of record having a general and unlimited jurisdiction; its records import absolute verity, and it is not required that its orders and decrees should show upon their face facts and evidence indicating such jurisdiction. *Sawyer v. Richmond*, 16 O. S., 456; *Railroad v. Village of Belle Centre*, 48 O. S., 273.

The right or authority to make the entry removing J. M. Ferguson and appointing Amor Smith, Jr., and the order to sell, therefore, are questioned because the first does not affirmatively show upon what ground Ferguson was removed, as required by Section 6017, Revised Statutes, nor that Smith was appointed, because he was either a creditor or relative, under Section 6005 (which specifies the order in which said persons are entitled in the first instance to administer estates), or under Section 6018 authorizing the appointment of a suitable person as the successor. The same point is made in the second case, where the court, on motion made ten years thereafter, declined to set aside the order of sale, because such order omitted any reference to evidence having been offered to justify a sale to pay debts.

It has been shown that the probate court is a court of record and of general jurisdiction; and that an affirmative finding of such facts to indicate jurisdiction is not essential.

It is insisted that these facts are erroneous if done with full jurisdiction. There are no jurisdictional facts claimed, affecting the removal of the first administrator nor the appointment of his successor *de bonis non*. It is argued that the latter did not comply with Section 6005 in giving a full statement of the value and nature of the estate, and that said successor made

contradictory statements as to the intestacy of the estate. Conceding, for the sake of argument, the necessity for so doing, I fail to recognize these as jurisdictional acts. There was a substantial compliance with Section 6005, in that some information was given and a reference made to the former statement signed by the original administrator. An erroneous recital therein could in no event prejudice the appointment. *Schumacher v. McCallip*, 69 O. S., 500, denied the right of trust companies to act as administrators, because they could not verify an affidavit of the testacy or intestacy of the deceased. This decision, however, rested mainly on the ground that trust companies had not capacity to act as administrators, and that the law granting them such power was unconstitutional. It recognized the necessity of the administrator furnishing such a statement, but did not determine the effect of a failure so to do. In *Carr v. Hull*, 65 O. S., 394, our Supreme Court held, in a case by direct attack, as irregular, a proceeding to sell to pay debts, on a showing that there were no debts of the estate except the costs of administration. These cases do not support the argument of plaintiff's counsel on jurisdictional facts. On the contrary, the last case cited, as appears from the opinion on page 396, distinctly holds that a removal made under Section 6005, without showing assets to the amount of \$100 as required by law, and the appointment of a successor under Section 6018, for failure to state that there were no assets and that there were debts, were questions which could not be attacked in a collateral proceeding. Had these been considered jurisdictional facts they could have been attacked in a collateral proceeding to sell to pay debts.

Taking the alternative of the proposition, that these are irregularities for which error would lie, what is the situation? Plaintiffs in error say that this is a direct attack, as it is brought in the same proceeding. This is true, but the exceptions are not taken within time. The removal of Ferguson and the appointment of Smith were made in 1900. The original order of sale in the second case was made in 1903. No exceptions were taken at the time to either of these orders of court. Indeed, the

1905-6.]

Estate of Anthony Ferguson, Deceased.

record shows that these petitioners consented to all of these steps. If this were not a sufficient estoppel, they insist that they can, three years after such removal and appointment, and ten years after the original order to sell, and without a bill of exceptions taken within the time required by the statutes, set aside such proceedings, merely because exceptions were taken in the same case. It is insisted that this can be done because the entries in such case do not affirmatively show that the decision was had after a hearing of evidence, and that the record being silent, it follows that no evidence was heard, and, therefore, no bill of exceptions is required. It is unnecessary, from what has been stated heretofore, to reiterate that such a finding is not essential, and to cite authority for holding that this court can not set aside the actions of the probate court without a record indicating the basis of that court's determination.

If, however, a bill of exceptions were now before the court, the proceedings in error to remove the first administrator can not form the basis of a review in this court. *Monger v. Jeffras*, 62 O. S., 149; *Schumacher v. McCallip*, *supra*.

There has been no change in this respect in legislation. There was a law passed in 1902 (95 O. L., 406), permitting appeals from the removal of administrators, but none, so far as the court can find, relating to proceedings in error.

The court sees no necessity, therefore, for examining authorities to sustain the acts of Smith as administrator *de bonis non*, on the theory that he was nevertheless a *de facto* officer.

There is but one exception which was taken in time. This was to the confirmation of a sale to a purchaser, made in 1903, under the old order of sale. It appears from the record that in seeking to vacate a sale of a large tract of land adjoining the city, there were seven appraisements and fourteen different offerings before the property was disposed of. The costs amounted to over \$5,000, and the assessments to over \$6,000. As has heretofore been stated, the petitioners raised no objection to what took place in those ten years, until the final entry was made disposing of the property to the present purchaser. It is asserted that no good faith has been shown by them. The

objection to the sale is that after the court had ordered the property subdivided into three parcels, and it was separately appraised, it made a subsequent order fixing an upset price (which was two-thirds of the last appraisement) without revoking the former decree, and that as both stood, the appraisements and sales thereunder were improper and irregular. *Brown v. Insurance Company*, 6 C. C., 65, is cited. In that case the court stated that a party litigant is not entitled to have two appraisements of the property made at the same time. I fail to see the application of the authority, or, indeed, any merit in this contention. The sale realized more than two-thirds of the last appraisement and more than the upset price fixed by the court. There was no real inconsistency in the two orders, and in no respect can there be any possible prejudice if it were an irregularity. Indeed, it is not so conceded by counsel making the objection.

There is, therefore, no error apparent of record in either of the two cases.

The judgment of the lower courts is affirmed, with costs against the plaintiffs in error.

John R. Von Seggern, for plaintiffs in error.

Jesse Lowman, contra.

1905-6.]

Ex Parte George M. Boswell.

**CRIMINAL TRIAL BY JUSTICE OF THE PEACE OUTSIDE
OF HIS TOWNSHIP.**

[Common Pleas Court of Franklin County.]

EX PARTE GEORGE M. BOSWELL.

Decided, September 25, 1905.

Justice of the Peace—Jurisdiction of, and Power to Hold Court Distinguished—Criminal Trial Held Outside of Township—By Consent of Defendant—Proceedings Invalid.

Neither the statutes now in force nor the history of the law furnish authority for the holding of a criminal trial by a justice of the peace outside of the township in which he resides and was elected, and such authority is not conferred by consent of the accused.*

DILLON, J.

Application is made in this court by George M. Boswell for writ of habeas corpus for his discharge from the county jail, to which he has been committed by one of the justices of the peace of this county.

The applicant was arrested by one of the deputy game wardens of this state on view of an unlawful possession of a certain fish under size. The arresting officer proceeded to take him before a certain justice of the peace in and for one of the townships of this county. The distance being rather great, and learning the justice was in the city of Columbus, which is not in that township, as a matter of convenience he was taken at once before the justice in the city. A written charge was duly filed against him, and he was convicted. The only question presented in this case is whether or not the justice of the peace may hold his court and conduct a criminal trial in any township other than the one in which he resides and which elected him to the office.

The Constitution of Ohio, Article IV, Section 9, provides for the office of justice of the peace, but leaves all the regulations with respect thereto to the Legislature. At the outset, we must distinguish between jurisdiction of the justice of the peace, and his power to hold court. In certain civil matters, such as attachment, and in criminal matters, the jurisdiction of a justice of

*For a contrary holding as to civil cases, see *Stark v. Treat*, 6 C. C.—N. S., 286.

the peace is co-extensive with the county. In other matters, it is limited to the township in which he resides. It is provided by Section 582 of the Revised Statutes of Ohio as follows:

“The jurisdiction of justices of the peace, in civil cases, unless otherwise directed by law, is limited to the township wherein they have been elected, and wherein they reside; but no justice of the peace shall hold court outside the limits of the township for which he was elected.”

It is well settled that if a court be held at a time or place not authorized by law, all its proceedings are void. *Ex Parte Jones*, 27 Ark., 349; *Ex Parte Stow*, 27 Ark., 354; *Ex Parte Allison*, 13 Colo., 525.

The authorities are not altogether harmonious upon the question of the right of a justice to hold court at will, but the doctrine seems to be held by many of the states that unless restricted by law either by express statute or implication, a jurisdiction. And this is especially true where the jurisdiction of the peace may hold court at any point within his of a justice of the peace is uniform as to all matters and is confined to the township in which he was elected, the limitation in such cases being that he may hold court at any place in such township which he himself may desire. *Cheatham v. Brien*, 3 Head. (Tenn.), 552; *Morgan v. Coleman*, *Id.*, 352; *Skelton v. Baker*, 7 Heisk., 292.

In Ohio, we have the statutory provision that a justice of the peace is elected by the people within the limits of a township; his residence must be maintained therein, and he loses his office upon removal of his residence therefrom. It has been urged upon the part of the state that Section 610 implies the power to a justice to hold court in any part of the county. This section read as follows:

“Every justice of the peace shall be a conservator of the peace, and shall have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, on view, or on sworn complaint, to cause every person charged with the commission of a felony, or misdemeanor, to be arrested and brought before himself, or some other justice of the peace, and on such person being brought before him, to inquire into the complaint and either discharge or recognize to be and ap-

pear before the proper court at the time in such recognizance named, or otherwise dispose of the complaint as is provided by law; and he also shall have authority to hear complaints of the peace, and issue search warrants."

It will be noticed that the foregoing section does not apply to the act of the justice of the peace as a court, but refers to his individual act as a conservator of the peace, and under that statute it would be his duty to see that every person who has been charged with an offense should be properly arrested and brought before a proper tribunal for trial. A court must be distinguished from the individual presiding over it. The individual may act over his own signature, or by his own individual conduct. A court speaks by its proceedings as shown by its journal or record. A court indeed consists of an official assembly under authority of law at an appropriate time and place for the administration of justice. The place and the time of its meeting are important elements of a court.

So far as civil actions are concerned, Section 582 above quoted leaves no doubt. The argument is made, however, that this limitation upon the justice to the effect that he shall not hold court outside of the limits of the township in which he is elected, following as it does the matter referring to civil actions, was intended to apply to civil cases only. The very positive and sweeping terms of the clause, however, would raise great doubt that this is the true construction. The limitation is positive, and without exception provides that no justice shall hold court outside of the limits of the township, and I am of opinion that the limiting of the jurisdiction of justices of the peace in civil cases to the township wherein he is limited would of itself be sufficient to limit the place of his holding court, for the reason that he would have no jurisdiction in such cases outside of the township, and therefore under the well settled principles of law would have no jurisdiction to hold court outside. The addition therefore of the limiting clause would be unnecessary if it were to refer solely to the jurisdiction of the justice in civil cases.

Aside from this preemptory injunction of the statute, the history of the law with reference to justices of the peace, their location, the requirement that they should reside in the town-

ship, and that they should lose their office if they should remove therefrom, the evils which would naturally result if all of the justices of the county might collect in any one favored locality and abandon their various townships for the trial of attachment and criminal cases, indicate very strongly that there has never yet been signified, either by legislation or by practice, the holding of a court by a justice of the peace other than in his own township, and, therefore, irrespective of Section 582, I do not believe it authorized. I call attention to the very excellent discussion of this question by Mr. Justice Brewer when he was on the supreme bench of the state of Kansas, in the case of *Philips v. Thralls*, 26 Kansas, 780. Speaking of the statute which in criminal cases gives jurisdiction to justices of the peace co-extensive with their counties as provided by the laws of Kansas, he says:

“This fact presents the difficulty. Does this extending the limits of their territorial jurisdiction beyond the limits of the territory which elects, give them a right to hold court anywhere within the larger limit, or must the locality of the court be confined to the territory which elects? * * * He is an officer of the township; his court is a court of the township; and his court as a court has no valid existence outside the limits of that township. One purpose contemplated in the organization of these courts was to have neighborhood courts, convenient to every individual for the settlement of minor disputes. If one justice may move his court out of the township to any other place in the county, all may; and we may have the spectacle of all the justices of all the townships in the county congregating in the county seat, and holding office there. Thus would one of the beneficent purposes of these inferior courts be defeated.”

In the case at bar it was further argued by the state that the defendant himself when arrested was willing to be tried within the city, as a matter of convenience, rather than travel eight or ten miles to the residence of the justice in the country. I think it hardly needs the citation of any authorities to observe the well known principles of law in a criminal case: whatever consent may be given to the jurisdiction of the person, nevertheless jurisdiction of the subject-matter can only be conferred upon a court by consent. I therefore find that the petitioner in this case has been

1905-6.]

Fancher v. C. & S. W. Traction Co.

improperly restrained of his liberty and must be discharged from custody.

J. V. Lee, for plaintiff.

A. T. Seymour, for defendant.

EFFECT OF DEATH OF PLAINTIFF SUING FOR INJURIES.

[Common Pleas Court of Lorain County.]

ALICE FANCHER v. THE CLEVELAND & SOUTHWESTERN TRACTION COMPANY.

Decided, October 11, 1905.

Pleading—Necessity for Amendment of Petition—In Case of Death of a Plaintiff Suing for Injuries—when the Action Survives in Name of Administrator.

Where a plaintiff who has sued for damages on account of personal injuries dies before the action is determined, and the suit is revived in the name of the administrator, the filing becomes necessary of an amendment to the petition or a supplemental petition, setting out when the original plaintiff died and whether death was the result of the injuries alleged in the petition.

HAYDEN, J.

There is a matter that has been submitted to me in the case of Alice Fancher v. the Cleveland & Southwestern Traction Company, viz., to require the plaintiff by amendment to the petition already filed in this case, or by supplemental petition to set forth: First, when the said Alice Fancher died; second, whether said Alice Fancher died as the result of the injuries alleged to have been received by her in the petition or from some other cause; third, by what court said administratrix was appointed.

This is a case in which it appears that Alice Fancher, the plaintiff in the case, brought an action against the Cleveland & Southwestern Traction Company to recover for injuries which she says she had sustained by reason of some negligence—what it is I do not know, and it does not make any difference—and

that since the commencement of the action the plaintiff has died, and the action has been revived in the name of the administratrix appointed for the plaintiff. This motion is to require, as I have said, that plaintiff, the administratrix, either by amendment or by supplemental petition, set out when Alice Fancher died, and whether she died as the result of the injuries alleged to have been received by her in the petition or from some other cause.

Now the action brought by Alice Fancher is one which, if she had not died from the injuries, if the injuries did not cause her death, would survive and which might be revived in the name of the administratrix and proceed to recover for the injuries, if those injuries did not cause her death. If those injuries did cause her death, then I think that action would abate, and the only action that could be prosecuted for the result of those injuries would be an action by the administratrix appointed upon her estate to recover of the defendant a certain sum not exceeding ten thousand dollars, for the benefit of next of kin.

It is not a new or different cause of action, but it is a new action provided for by the statute. But I do not think that it can proceed if the injuries which she received and for which she sued on in the original petition are the ones which caused her death; so I think it ought to be shown when she died as stated here, and whether or not she died as the result of the injuries alleged to have been received by her in the petition or from some other cause. The case in the 58 O. S. is one which I think should govern and control this. I will have to sustain the motion then on the first two grounds.

I do not think it makes any difference whether it is set up by what court the administratrix was appointed; but as to the first and second grounds of the motion I will have to sustain it.

Skiles & Skiles and *Lee Stroup*, for plaintiff.

E. G. & H. C. Johnson and *Wilcox, Collister, Hadden & Parks*, for defendant.

1905-6.]

In re Avon Beach & Southern Railway.

**GRADE CROSSINGS IN MUNICIPALITIES UNDER THE
NEW LAW.**

[Common Pleas Court of Lorain County.]

**IN RE APPLICATION OF THE AVON BEACH AND SOUTHERN RAIL-
ROAD COMPANY.**

Decided, July 13, 1905.

*Railways—Grade Crossings—Authority to Make in Municipalities—
Construction of the New Law—Application of, to Steam Railways
—And to Railways Other than Steam—Classification of a Rail-
way, How Determined.*

1. In the statutes of Ohio, when the term railroad is used, steam rail-
road is meant, unless it clearly appears that some other meaning
is intended.
2. Whether or not a railroad is a steam railroad, within the meaning
of the statutes of Ohio, may be determined, not only by the pro-
visions of its charter, but evidence is admissible to show how it is
constructed and operated and the character of the business it is
engaged in, and the mode and manner of conducting such business.
And if the road is not completed and in operation, evidence is ad-
missible to show how it is to be constructed and operated and the
character of the business it is to engage in, and the contemplated
mode and manner of conducting such business.
3. The law relating to the establishment of grade crossings (97 O. L.,
546), relates exclusively to steam railroads, and in the case of an
application to the common pleas court under this act by a railroad
for permission to lay its tracks at grade over street crossings, and
to prescribe what gates, signals, etc., shall be maintained, if the
court find from the testimony that such railroad is not a steam
railroad, it is without jurisdiction in the premises.
4. In the case of steam railroads, the court, under 97 O. L., 546, may
grant permission to construct a grade crossing conditional upon
the acquirement by the company, either by agreement with the
municipal or other officers in charge of the road or street, or by
condemnation, the right to do so. Such agreement or condemna-
tion need not precede the permission granted by the court.

WASHBURN, J.

This is an application on behalf of the Avon Beach and
Southern Railroad Company, wherein it is sought to have this

court grant said company permission to lay its tracks across certain streets in the city of Lorain, at grade, and to prescribe what gates, signals and other safeguards shall be maintained by said company at said crossings in addition to the signals and safeguards prescribed by statute.

This application is filed under a provision of a law passed in April, 1904, and found in 97 Ohio Laws, at page 546, and which will be referred to hereafter in this opinion as a new law. For convenience sake I shall designate the said company as plaintiff, and the municipal corporation of the city of Lorain as defendant.

Before plaintiff filed its petition, proper notice under said new law was given to the defendant, and the defendant has filed an answer and entered its appearance and participated in the trial of the case, without any further notice than that served upon it previous to the filing of the petition.

Before the hearing, and at the request of both parties. I viewed the premises in question. A part of the proposed line has been constructed that is, that part from Grove avenue in the city of Lorain, where the plaintiff's line connects with the Lorain Street Railway Company, and thence east across all of the streets in question, except Thirteenth avenue. The line so far as it has been constructed is at grade with said streets, and except where it crosses said streets is upon a private right of way, and so far as the rails have been laid poles have been erected and trolley wires strung, and it was the intention of the plaintiff to build on across Thirteenth avenue, crossing the same at its junction with the Globeville road, which is on the west bank of Black river.

It is conceded that the plaintiff received no grant, license or permission from the defendant to lay its tracks across the streets as they are now laid, and after the rails were laid as far as they are now laid, the defendant, through its mayor, stopped further construction of the road, and by agreement of the parties nothing further has been done. After the work was stopped, the plaintiff company made application to the defendant for permission to lay its tracks across said streets, and the defendant, on

1906-6.]

In re Avon Beach & Southern Railway.

the advice of its city solicitor, declined to grant such permission, on the theory that it had no authority to grant such right to the plaintiff, it being claimed that the authority to grant such right was vested in the court, by virtue of said new law.

The plaintiff claims that it is a railroad, organized under the general railroad laws of Ohio, and that as such, by reason of the provisions of said new law, it should be granted the permission asked for in its petition by this court.

The defendant claims that the plaintiff is not a railroad within the meaning of said new law, and that if it is a railroad within the meaning of said law, it can not be granted the permission it asks until it has acquired from the defendant, either by agreement with the defendant or by condemnation proceedings, the right to cross said streets.

This last claim is made under the provisions of Sections 3283 and 3284 of the Revised Statutes of Ohio, which read as follows:

“Section 3283. If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company may agree upon the manner, terms and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals, but every company which lays a track upon any such street, alley, road or ground shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two years from the completion of such track.

“Section 3284. A company may, whenever it is necessary in the construction of its road to cross a road or a stream of water, divert the same from its location or bed; but the company shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness, and any or all railroads hereafter constructed, which shall cross any

avenue or public highway leading from a city of the first or second class to a public cemetery of such city, situated within or without the limits of any such city, shall be constructed so as either to pass under or over such avenue or public highway, at such elevation or depression, as the case may be, as will allow the unobstructed passage of all wagons, carriages, or other vehicles which it may be necessary for any person to use upon such avenue or public highway."

If the plaintiff is a railroad company within the meaning of said new law, then the contention of the defendant, that the plaintiff can not build across said streets until it has acquired the right so to do from said defendant, or by condemnation proceedings, is supported by a Hamilton County District Court opinion, *Cincinnati Northern Railway v. Cincinnati*, 8 Bull., 334, in which it was decided that:

"The right to fix a terminus of a railroad in a city does not imply the power to cross intervening streets without consent or condemnation."

And in that case the railroad company was enjoined from crossing the street until it had acquired the right to do so, either by agreement with the municipality or by condemnation proceedings.

Said contention is also supported in the case of *Youngstown v. Railway*, 3 C. C., 214, in which it is said that:

"The provision of said Section 3284, which declares 'a company may, whenever it is necessary in the construction of its road to cross a road or a stream of water, divert the same from its location or bed,' does not authorize a railroad company to construct and maintain its road across a street of a city, without consent of the city authorities or without appropriating the right to do so; but such right of occupancy of a street can be obtained only by agreement with the city authorities or by appropriation, as provided in Section 3283, Revised Statutes."

These two circuit decisions are directly in point and should be followed by this court in the absence of authority to the contrary.

I have found and have been cited to no authorities to the contrary, and unless the new law heretofore referred to supersedes

1906-8.]

In re Avon Beach & Southern Railway.

those sections, the contention of the defendant would appear to be well taken, so far as requiring plaintiff to acquire, by agreement with the defendant or by condemnation proceedings, the right to lay its tracks across said streets, before it can legally build its road across them.

It is true, that my attention has been called to a decision of Judge Boynton in *Little Miami Ry. v. Greene County*, 31 O. S., 338, 346, where, in discussing said Sections 3283 and 3284, he treats the former as relating to the use of the street or any part thereof by a railroad company running along a highway, and Section 3284, as providing for a railroad company using a street by building across the same; but that was not a point decided in that case, and *Cincinnati Northern Ry. v. Cincinnati and Youngstown v. Railway*, *supra*, were decided, one of them seven years after the above decision of Judge Boynton and the other more than ten years thereafter, and I believe it is the duty of this court to follow said circuit court decisions rather than the *obiter dictum* of the judge deciding the 31st O. S. case, in view of the fact that the circuit court judges must have had that before them when they decided those cases.

Besides Section 3283 was discussed by the Supreme Court as if it applied to *crossings* in the following cases: *Railway v. Defiance*, 52 O. S., 262; *L. S. & M. S. Ry. v. Elyria*, 69 O. S., 414. See, also, *Zanesville v. Fannen*, 53 O. S., 605.

The new law above referred to, makes no mention of any other laws of the state; it amends none, and does not in terms repeal any. It provides that:

“Except as in this act elsewhere provided, all crossings hereafter constructed, whether of highways by railroads, or of railroads by highways, shall be above or below the grade thereof.”

And due notice having been given—

“The court of common pleas shall thereupon have jurisdiction of the parties and the subject matter of such petition, and may proceed, summarily or otherwise, and upon such notice as it shall deem sufficient, to examine the matter, either by evidence, by reference to a master commissioner or otherwise; and if satisfied that such construction is reasonably required to ac-

commodate the public, or to avoid excessive expense, in view of the small amount of traffic on the highway or railroad, or in view of the difficulties of other methods of construction, or for other good and sufficient reasons, then it shall make an order or orders permitting such crossing at grade to be established; and it may, in such order, in its discretion, prescribe what gates, signals, or other safeguards shall be maintained by the railroad company, in addition to the signals and safeguards prescribed by statute."

Said law also provides that:

"Such railroad company may exercise the power contained in its charter and the general laws, for altering the grade and location of highways in order to avoid grade crossings."

The power above referred to has reference to Section 3284 quoted above, and a fair construction would seem to be, that the new law was not intended to supersede said section; but that it was intended that a railroad company should be required to acquire the right in the manner provided in Section 3284 to cross a street, and in addition thereto that it should be required to obtain the consent or permission of the common pleas court before it could exercise that right by constructing its road across a street at grade.

I do not think that it was the intention of the Legislature, by said new law, to take away from municipalities the right given them in Section 3283, to agree upon the manner, terms and conditions upon which a railroad might cross its streets, except so far as they are not permitted to agree to a grade crossing. Neither was it intended to invest the common pleas court with authority to grant a railroad the right to lay its tracks across a street in a municipality against the protest and objection of the municipality, without appropriating the right to do so by condemnation proceedings.

If, before this new law, a railroad could not cross a street in a city without acquiring the right to do so, either by agreement with the city or by condemnation proceedings, then it seems to me that it can not do so now. The new law, in this particular, should be strictly construed (*Delaware, L. & W. Ry. v. Buffalo,*

1905-6.]

In re Avon Beach & Southern Railway.

158 N. Y., 266, quoted with approval in *L. S. & M. S. Ry. v. Elyria*, 69 O. S., 414, 434).

This construction of the new law is fortified when we remember that it gives to the common pleas court the right to permit a city to construct a new road or street across a railroad right of way at grade, to exactly the same extent and in the same manner that the court can permit a railroad company to build at grade across a street.

It will hardly be contended that this new law vests in the court the authority to permit a city to construct a highway across the right of way of a railroad without said city having acquired the right to do so by condemnation proceedings or otherwise, as provided by law.

That a city can not open a new street across a railroad without acquiring the right to do so by agreement or by condemnation proceedings, see *C., H. & D. Ry. v. Troy*, 68 O. S., 510. See, also *L. E. & W. Ry. v. Hancock County*, 63 O. S., 23.

I think, however, that a fair construction of said laws would not require the railroad company to acquire the right to lay its tracks across a street by agreement or by condemnation proceedings *before* it was granted permission by the common pleas court to construct a grade crossing.

In other words, permission to construct a grade crossing may be granted by the common pleas court, conditional upon the railroad company's acquiring, either by agreement or condemnation, the right so to do, and hence the contention of the defendant that permission can not be granted in this case at this time is not well taken, provided the plaintiff is a railroad within the meaning of said new law.

But defendant contends that the plaintiff is not a railroad within the meaning of said new law. It will be noticed that said new law refers only to "railroads", without saying whether that term includes electric railroads, interurban railroads or street railroads. It will be noticed also that the law seeks to absolutely prohibit grade crossings, except where for special reasons the court shall decree otherwise.

It would seem that the Legislature here intended to legislate against the kind of railroads which are especially dangerous, when built and operated at grade across highways, and that would mean steam railroads. .

It manifestly can not apply to street railroads, that is, such as are built upon and run along the streets, for the purpose of facilitating travel therein. If they are permitted to operate at grade along streets, there would be no sense in prohibiting them from crossing intersecting streets at grade. The same reasons apply to a large extent to interurban electric railways, for it is a matter of common knowledge that they are operated upon streets and highways, both in and out of municipalities, and their business requires frequent stops, and their cars are much easier and more quickly stopped than steam cars, and there is very much less danger in their operation at grade across streets and highways than there is in the operation at grade of steam railroads across streets and highways.

Most of the laws in reference to railroads are found in the Revised Statutes from Section 3270 to Section 3436. And the laws applying to all kinds of railroads, such as street railroads, interurban railroads and electric railroads, is found from Section 3437 to Section 3443-18; and in Section 3309a it is provided that:

“Nothing in this section or in the sections of the Revised Statutes relating to railroad companies, prior to Section 3437, other than in Sections 3287, 3288 and 3289, shall be construed as affecting street railroads.”

In the statutes, all the laws in reference to interurban and electric railroads are placed under the classification referring to street railroads.

As showing that the Legislature treats steam railroads as being in one class, and all other railroads as being in another class, generally referred to as street railroads, Section 2780-17 is important. The Legislature there provided that for purposes of taxation, steam railroads shall be considered as one class, and that all other railroads, such as street and interurban railroads, shall be taxed as another class.

1905-6.]

In re Avon Beach & Southern Railway.

It is true that under Section 3310-1, a steam railroad is given authority to use electricity as a motive power in the propulsion of cars. But the Legislature in defining railroads and street railroads, for the purpose of taxation in Section 2780-17, places the distinction between them upon the business they are engaged in, and provides that a company, "when engaged in the business of operating a street, suburban or interurban railroad, either wholly or partially within this state, whether the cars used in such business be propelled by animals, steam, cable, electricity, or other motor, shall be deemed to be a street, suburban or other interurban railroad."

It is said that the charter of the plaintiff gives it a right to operate a steam railroad, hence it is a steam railroad, and that this court can not receive or consider evidence other than the provisions of said charter, in order to determine whether or no it is a steam railroad.

Interurban electric railroads operate in this state under steam railroad charters, and conduct the business of interurban railroads and of street railroads under such charter; and steam railroads are granted the right to use electricity in the propulsion of their cars the same as electric railroads. Both street railroads and steam railroads are given the right of eminent domain, and the right to carry passengers, express matter and freight, and to construct a double or single track railroad, with switches, turn-outs, etc.; in fact, their powers in many particulars are alike; but at the same time the Legislature has been careful to keep the laws in reference to each separate and distinct; and has enacted, that whatever their charters are, they shall be judged as to what they really are, for purposes of taxation, by the manner of their construction and operation, and the character of the business they engage in (2780-17).

The charter of a company is prepared by a company itself; it asks permission to engage in a certain business in a certain manner, and the permission is granted. It would seem unjust to permit a company to ask for and receive permission to construct and operate and transact the business of a steam railroad, and after it is constructed and operated and is engaged in the

business of an interurban railroad (the two kinds of railroads being separate and distinct under the laws of this state), to permit it to require that it shall be judged by what it asked permission to do, and not by what it in fact is doing. The Legislature, for purposes of taxation, has enacted that railroads shall be judged by what they are doing, rather than by what they asked permission to do, and I do not see any valid objection to the courts applying the same rule.

Plaintiff will not claim that it should be taxed as a steam railroad, nor that the fellow-servant statute, applicable to steam railroads, is applicable to it. It hardly seems proper to permit a company to do one thing under the guise of doing something else, and to claim the rights and benefits of one class of railroads, and escape the disadvantages and liabilities of that class.

As to the question whether the court can consider other evidence than the charter of a company to determine what kind of a company it is, I will say that I have not been cited to any case directly in point, and in the very short time I have had to consider this case I have found none; but in a case like this, in view of the legislation of this state, above referred to, it seems to me fair to say, that the kind of business in which a company is engaged, and the manner of operating its road, is more important than the language of the charter of the company, and I have concluded, therefore, to consider the evidence which was objected to at the time of the trial.

The word "railroad" as used in the statute, and as it is used in the new law in question has *been* construed by the Supreme Court. Section 3208 provides that—

"A person who performs labor or furnishes materials for or in the construction of any railroad * * * shall have a lien for the payment of the same upon such railroad," etc.

And in 1898, a railroad to be operated by electricity, partly in one city and through the country and on the streets in another city was constructed, and certain persons who performed labor and furnished materials in the construction of said railroad sought to perfect a lien under said Section 3208, and it was claimed that the word "railroad" as used therein did not apply

1906-6].

In re Avon Beach & Southern Railway.

to such a railroad as was then constructed, and our Supreme Court decided in *Massillon Bridge Co. v. Iron Co.*, 59 O. S., 179, that:

“The statutes of this state relating to railroads are separate and distinct from those relating to street railroads, and the word ‘railroad’ in Section 3208 * * * does not include street railroads.”

And it was stated in the opinion, page 186, that:

“Sections 2501 to 2505*d*, inclusive, are all prior to Section 3437, and all affect street railroads; but they do not relate to railroads, thus showing that the General Assembly did not regard even interurban street railroads as being included within the word ‘railroad.’”

In *C., L. & A. Elec. St. R. R. v. Lohe*, 68 O. S., 101, the Supreme Court decided that:

“An interurban electric railroad is classed as a street railroad by the statutes of this state.”

And in the opinion, page 109, it is said:

“The legislation in this state as to railroads and street railroads has been kept separate and distinct. Interurban railroads, such as the one in question in this case, are classed by the General Assembly as street railroads. Section 2780-17, Revised Statutes.

“The construction and operation of such railroads is authorized by the act of May 17th, 1894 (91 O. L., 285), and carried into Bates’ Statutes as Sections 3443-8 to 3443-13.”

Section 6 of that act is as follows:

“Such companies shall be subject to the same regulations now provided for street railroads, in so far as the same are applicable, and shall have all the powers, in so far as they are applicable, that *other* street railroad companies have.”

Section 3333-1 is a section similar to the one now being construed, and that provided—

“Where it becomes necessary (outside of the corporate limits of a city or village) for the track of one railroad company to cross the track of another railroad company, unless the manner

of making such crossing shall be agreed to between such companies, it shall be the duty of the court of common pleas of the county wherein such crossing is located * * * to ascertain and define by its decree the mode of such crossing," etc.

That section was construed on November 23, 1903, by the Circuit Court of Darke County (*Dayton & Union Ry. v. Traction Co.*), and one of the judges participating in that decision is now one of the judges of the Supreme Court. It was there held that:

"Steam railroad companies and electric railway companies are classified and recognized as separate and distinct from each other by the statutes of Ohio; and statutes relating to and regulating the former are inapplicable to the latter, unless an intention to the contrary clearly appears.

"A steam railroad company can not invoke the power of the common pleas court under Section 3333-1, Revised Statutes, to ascertain and define the manner in which an interurban electric railway company may cross its right of way, as the statute is applicable to steam railroad companies only." 4 C. C.—N. S., 329.

On page 335 the court uses this language:

"On the same day that the special act under which this proceeding is sought to be prosecuted was passed, the Legislature passed another act conferring upon electric railroads the power of eminent domain. The railroads had had that power from their inception, and if an electric railroad is identical that legislation would be superfluous. The Legislature clearly understood that they were different roads, and we are driven to the conclusion that the word 'railroad' in this statute has a fixed legal significance. It means a *steam commercial road* and nothing else, and whenever it is used in a statute that meaning must be given to it unless it clearly appears that some other meaning is intended."

The railroad company in question in the above case, so far as can be learned from the opinion, was very similar to the railroad company which is plaintiff in the case at bar, and without deciding what kind of a railroad the plaintiff company is, whether an electric railroad, an interurban railroad or a street railroad, the above decision is authority for holding that said new law does not apply to it, unless it is a steam railroad.

Is the plaintiff a steam railroad? In the petition of the plaintiff this language is used: "Your petitioner further represents that it expects to use electricity as a motive power in the propulsion of its cars," and the proof at the hearing shows, that so far as it has been constructed it has been constructed with a view to using electricity as a motive power, and in a manner similar to interurban electric railroads.

The testimony shows that it intends to purchase its power from the Lake Shore Electric Railroad Company, and that its chief connections are between the Lake Shore Electric Railroad Company and the Lorain Street Railway Company, and that its private right of way between the streets which it proposes to cross is but 15 feet wide.

It is true that its charter provides that its westerly terminus shall be in Oberlin; but the proof shows that there have been no surveys west of its connection with the Lorain Street Railway Company, and no steps taken whatever indicating that it will ever be built west of said point.

It is also true, that by the charter of the plaintiff it is granted the right to use steam as a motive power; but the circumstances and surroundings are such that it is very plain to the court that such is not its intention. Its connection on the west is with the Lorain Street Railway Company, which is distinctly a street railway company, organized and operated as such, and its connection on the east is with the Lake Shore Electric Railroad Company, which the evidence shows is not a steam railroad, but is engaged in the business of conducting what is generally understood to be an electric interurban railroad. It runs through the country on private right of way, and in the various cities it operates on the streets under franchises the same as street railroads, and the testimony shows that it is the intention of the plaintiff, by the construction of the proposed road, to form a connecting link between these railroads, and to use the cars of these railroads upon its line, and to use a common source of power in the propulsion of its cars.

I find from the testimony, that in the business which the plaintiff is to transact, and in the manner of transacting that

business, and in the manner of the operation of its road, it is very much like those roads with which it connects, and judging the plaintiff by its application, by its construction so far, and by its contemplated construction as declared by its officers and agents, and by its connections and the character of the business it intends to conduct, and the manner in which it intends to transact the same, and by its situation and surroundings, I find that it is not intended to engage in the business of conducting a steam railroad; but that it intends to engage in the business of operating a suburban or interurban railroad; and construing said new law to apply only to steam railroads, this court has no authority to grant the application of the plaintiff; and the prayer of the petition will therefore be denied.

Not being a steam railroad, the plaintiff is authorized to build its road at grade across the streets in question without permission from this court, provided it acquires the right to do so under the laws of Ohio, other than said new law.

It is further ordered that the plaintiff pay the costs of this proceeding.

Exceptions will be noted for the plaintiff, and also a bond fixed in case it desires to appeal.

M. B. & H. H. Johnson, Thomas H. Hogsett, E. G. & H. C. Johnson and G. A. Resek, for the railroad company.

W. L. Hughes, Thompson, Glitsch & Cinninger, for the city of Lorain.

1905-6.]

Bershiet v. Cincinnati Traction Co.

MISCONDUCT OF JURORS.

[Superior Court of Cincinnati, General Term.]

**FLORIEN BERSHIET, A MINOR, v. THE CINCINNATI TRACTION
COMPANY.**

Decided, October 5, 1905.

***Examination of Jurors—On Their Voir Dire—Evasive and Misleading
Answers—Ground for a New Trial.***

1. A party who has been diligent as to the examination of proposed jurors, can not be required to submit his case to jurors who are disqualified by law and but for their own misconduct would have been subject to challenge.
2. When proposed jurors are sworn on their *voir dire*, they are sworn to tell the whole truth, and not a part of it, and their answers should squarely meet, without evasion, what is fairly expressed by the terms of the questions; and where one undergoing such an examination was guilty of evasion or concealment, the party examining him was deprived of a substantial right and is entitled to a new trial.

HOFFHEIMER, J.; FERRIS, J., and CALDWELL, J., concur.

Plaintiff in error was plaintiff below. The action was for damages. The plaintiff, a deaf and dumb boy, seven or eight years old, while on the streets of the city was run over by one of defendant's cars and suffered the loss of both legs. Verdict was for the traction company. Motions for new trial were duly filed, and several grounds were alleged, among others *misconduct of jurors*. The motions were overruled, and judgment entered upon the verdict. This proceeding is brought to reverse the proceedings below, and a number of errors are assigned, but we deem it necessary to consider but one, viz, misconduct of jurors.

The bill of exceptions shows the panel of the regular jury of the term incomplete, and the court directed the constable to fill the panel from the by-standers. This being done, the jury was sworn upon the *voir dire* and plaintiff's counsel asked the jurors whether they had served as jurors within the year.

All answered "no" with the exception of W. G. McIntyre, William Sterner and John Behymer, who answered affirmatively. Mr. McIntyre detailed his previous service during the preceding twelve months and was promptly challenged by plaintiff and excused by the court under Section 5176-9. After juror McIntyre had explained his service and was excused, counsel for plaintiff asked Mr. Sterner, "Have you served as juror within a year?" Defendant in error claims juror answered as follows: "Yes, sir; on the last case, last term, right in this chair." Whereupon counsel said, "Oh! You are a member of this jury," or "Oh! you have been a member of this jury?" Juror answered, "Yes, sir," and offered nothing further. The juror Behymer was similarly interrogated and answered that he served "the last four days of the last term, right here in this box." No further information was volunteered by him, and the jury was sworn. Plaintiff exercised but one peremptory challenge. Plaintiff in error claims that he was deceived by the misconduct of the jurors in failing to answer *truthfully*, and that he was thus prevented from exercising his challenge under Revised Statutes, 5176-9, or his remaining peremptory challenge.

In support of his motions he filed the affidavits of three reputable persons, to the effect, that when the question as indicated was put to the jurors, nothing was said by them with regard to service at the last term. The challenge to Mr. McIntyre shows that plaintiff intended availing himself of the provisions of Section 5176-9, and it was difficult to understand why, if Behymer and Sterner answered as they claim they did (using the words "last term"), no challenge was interposed as to them. Even if they answered as is claimed for them, there can be but little doubt that because of the peculiar answers given, counsel understood their answers to refer to current service in the box, in that room, because the answers of both, it will be noticed, restricted the services they described as jurors, to *that very box*. It will also be borne in mind that the "last term" ended the preceding Saturday.

To permit litigants to secure new trials on the ground that answers of jurors had been misunderstood, would certainly be

1905-6.]

Bershiel v. Cincinnati Traction Co

novel as well as dangerous, and courts should be chary of granting relief upon such pretexts. But where it becomes manifest that a misunderstanding did ensue, because of the equivocation, evasion or concealment of the juror, we think that abstract justice requires a remedy.

In the particular case under consideration, there was evasion and concealment of facts by the jurors, which under circumstances entirely their own creation, could not have been known to the plaintiff or to his counsel. That counsel misunderstood is manifest in his immediate rejoinder (when the juror said he served in *this box*) "Oh! You have been a member of this jury," and the juror said "Yes," concealing the fact that he had seen other service as a talesman during the preceding twelve months. After the verdict, it was discovered that Sterner and Behymer had served on several occasions during the preceding twelve months, in other courts of record in Hamilton county, Ohio. Plaintiff in error claims that under such circumstances the answers were *untruthful*, that he lost his challenge, and was led into accepting them as jurors.

Assuming that the jurors were subject to challenge, the question is, did counsel or plaintiff in error *wave* any objections they might have had? The cases hold that counsel must exercise *due diligence*, and that unless he does so, he must be held to have waived objections (*Eastman v. Wright*, 4 O. S., 156; *Hayward v. Calhoun*, 2 O. S., 164; *Kenrick v. Reppard*, 23 O. S., 333; *Watts v. Ruth*, 30 O. S., 32; *McGill v. The State*, 34 O. S., 228). Under our authorities, due diligence is indicated when jurors are placed on the *voir dire*, and it seems where one thus inquires, or to quote the language of our Supreme Court, "endeavors to inquire" as to the qualifications of the juror, he is not chargeable with laches (*Simpson v. Pittman*, 13 O., 365; *Beck v. The State*, 20 O. S., 228). In the case before us, the jury was not only sworn on the *voir dire* but counsel put the proper question, which, as the record shows, did not elicit such answers as the terms of the question merited.

When proposed jurors are sworn, they are sworn to tell the whole truth and not a part of it, and their answers, in all fair-

ness, should squarely meet, without evasion, what is fairly expressed by the terms of the questions. The fact that the jurors said or failed to say they served the last term, is seriously disputed, but there is no dispute as to the limitation and qualification both placed upon their answers, when they characterized their respective service as "right here in this box," and "right here in this chair," when as a matter of fact, they served in other boxes, in other court rooms, during the preceding twelve months. It must have been apparent to those jurors, at least to one of them, that the answer that evoked counsel's rejoinder as already set forth, had deceived counsel, and it certainly became the duty of the juror to detail fully and fairly his services during the preceding twelve months, more especially so, as the jurors had just witnessed the discharge of juror McIntyre, for service rendered by him during the past twelve months, and as openly stated by him. When counsel for plaintiff in error interrogated as to their service, he had the right to expect the jurors would answer fully and without evasion, and considering the experience these jurors must necessarily have had, in the impanneling of juries in previous trials, it is impossible to resist the conclusion that their answers were calculated to deceive for the mere sake of having opportunity to serve as jurors. Take the case of juror Sterner. According to his own statement, he served on the "last case, last term, right in this chair." When counsel rejoined "Oh! You have been a member of this jury?" juror answered "Yes, sir," and lapsed into silence. The fact is, he said nothing about other jury service rendered by him during the preceding twelve months, concerning which plaintiff in error and his counsel were in total ignorance. Behymer's answer was equally deceptive, for when he answered that he served and then qualified his service as "right here in this box" and offered no information in regard to other service rendered by him as a talesman, it seems to us that any ordinary careful person would be justified in supposing that the juror who had thus described his service with *particularity*, had explained all his service and had embodied all his service in his answer, and that there was no other. Yet, after the

1906-8.]

Bershiet v. Cincinnati Traction Co.

trial, it was found that this very juror who defined his services as stated, had joined in a verdict for this same defendant in error but two weeks before in the common pleas court of this county.

In *Rice v. The State*, 16 Ind., 298, a party was held not negligent in failing to discover that a juror had been on the grand jury, *even though he was not asked the direct question*, the juror having stated that he had not formed or expressed an opinion in regard to the guilt or innocence of the accused. See also *United States v. Christensen*, 7 Utah, 26. Failure to speak when there is a duty to speak, is as reprehensible as speaking falsely, and Lord Eldon long ago declared that "He, who undertaking to give information, gives but half information, *conceals*." It was this half information, this concealment, that rendered the answers of both jurors *untruthful*.

In *Busick v. The State*, 19 O., 198, a multiplicity of errors were assigned, and our Supreme Court said it was necessary to notice but one. A juror when examined on his *voir dire*, said he had formed or expressed no opinion. It afterwards developed he had. The court said: "The books are full of similar cases and the decision now made will only be cumulative." A new trial was granted.

That plaintiff in error was clearly deceived by the answers of these jurors, there can be but little doubt, and thus without fault on his part, or on the part of his counsel, plaintiff was not only deprived of his challenge under Section 5176-9, but did not even attempt to exercise his remaining peremptory challenge. If these experienced jurors had fully divulged and revealed their previous services as jurors during the preceding year, is it not more than reasonable to suppose it would have become expedient for the plaintiff below to have interposed his challenge for cause, or, if necessary, his remaining peremptory challenge?

The affidavit of Mr. Stimson, of counsel for defendant in error (Exhibit "N"), is to the effect that the records of the county courts were open to the inspection, and that, therefore, service of said jurors could have been ascertained by counsel for plaintiff.

iff in error. Speaking to this point, the court in *United States v. Christensen*, *supra*, very properly said:

"It is true if he had searched the records of the court he would have ascertained that fact, and it would have been commendable prudence and diligence to have done so, but we do not think his failure to have done so is such negligence as to deprive him of the right to be tried by an impartial jury, especially in view of the false answers given."

Nor do we think it was necessary for plaintiff in error to show that these jurors were prejudiced or biased. In *Watts v. Ruth*, *Kendrick v. Reppard*, *Eastman v. Wright*, *supra*, the objection did not go to the *impartiality* of the juror, but the Supreme Court held that it was enough to show that counsel had been sufficiently diligent in examining the juror. Aside from that, we incline to the belief that a juror who fails to fairly answer the questions on the *voir dire*, or who evades questions, or conceals information, can not but be a more or less biased juror.

Nothing can be more essential to the proper administration of justice, than that a party shall have a trial by a fair, unbiased and properly constituted jury. The law wisely safeguards this right in many ways, and bestows the right to challenge with this cardinal object in view. To hold, therefore, that a party, through no fault of his own, must submit his cause to jurors whom the law disqualifies, and who, but for their own misconduct, were subject to challenge, would be tantamount to depriving the party of a substantial right. *McGill v. The State*, 34 O. S., 238, 239.

Under the circumstances of this case, we are of the opinion that the motion for a new trial should have been granted. The judgment below is set aside and cause remanded for a new trial.

Henry P. Kaufman, for plaintiff in error.

Kittredge & Wilby and *George P. Stimson*, for defendant in error.

1905-3.]

Breuer v. Frank.

QUESTIONS OF NEGLIGENCE IN ENTERING AN ELEVATOR.

[Superior Court of Cincinnati, General Term.]

CHARLES C. BREUER V. LEWIS M. FRANK.

Decided, October 7, 1905.

Elevator—Employe of Tenant Falls Down Shaft—The Elevator having Crept up and the Door being Open—Negligence of the Landlord and of Plaintiff—Charge of Court—Duty of Harmonizing its Several Parts—"Excusing" Negligence—Proper Care and Caution—Silence of the Supreme Court as to Questions Raised at a Previous Trial—Law and Fact.

1. In reviewing a charge of court, the word "if" will not be read as equivalent to "unless," where to do so would render the statement contradictory of a preceding paragraph.
2. It is not error to leave it to the jury to say whether the facts and circumstances under which the plaintiff stepped into the open elevator shaft were such as to lull him into a sense of security, by leading him to think the cab was there to receive him.
3. The law excuses negligence under certain conditions, and in view of what had previously been said in the charge in question as to the combined negligence of the plaintiff and defendant, it was not error for the court to add: "If, on the other hand, you should find certain conditions existed [enumerating them], then it is for you to say whether those conditions excused any negligence there might have been on his part."
4. It has been repeatedly held that as a matter of law an elevator is not a place of danger, and to give a special charge to the contrary would be error.
5. Where the Supreme Court expresses no opinion on questions raised, at the first trial and the case is sent back for re-trial on account of certain errors that had been pointed out, and the same questions are again presented on the re-trial of the case, they may be considered as having been properly determined at the first trial.
6. A special charge is properly refused, where it holds plaintiff to the exercise of proper care and caution, without defining what would constitute proper care and caution under the circumstances of the case under consideration.

HOFFHEIMER, J.; CALDWELL, J., concurs; LITTLEFORD, J., dissents.

Plaintiff in error was defendant below. The action was for damages for injuries sustained by falling through an elevator shaft on premises owned by plaintiff in error.

The facts may be briefly stated, as follows: Defendant in error was a traveling salesman employed by a company that was a tenant of Breuer and occupied one of the upper floors in the building where the elevator in question was located. Breuer, the owner of the building, operated and controlled the elevator; on the day of the accident defendant in error came into the hallway of the building; he saw the elevator man sitting on a chair in the hallway; the man got up and followed Frank to the elevator; Frank walked directly to the elevator with the elevator man close behind him; he was so close behind him "he almost came on top of me"; the door of the elevator was "wide open," and Frank was looking "straight ahead"; Frank stepped forward, expecting to step into the cab, but instead stepped into an open space. The cab, it seems, was not in its place but had crept up the shaft; the hall was "semi-dark"; as a result plaintiff below was precipitated to the bottom of the shaft and suffered permanent injuries; the verdict was for nine thousand six hundred and seventy-five dollars (\$9,675), and in due course judgment was rendered upon the verdict.

Error is prosecuted to this court, and it is claimed that the verdict is grossly excessive; that the court erred in its general charge, and in refusing to give certain special charges requested by plaintiff in error.

It is earnestly contended by plaintiff in error, that the court erred in its general charge. At pages 363-4 of the record the court used the following language:

"If the plaintiff was rightfully entitled to the use of the elevator, then the defendant owed to the plaintiff the duty of having the elevator so constructed and operated as that one could use it with safety, and if you should find from the testimony the elevator was in good condition at the time of the accident, in good repair, not out of repair; that the conduct of the operator was in all respects what it should have been; that there was no negligence anywhere on the part of the defendant or his employees; that the accident was caused entirely by the want of due

1995-6.]

Breuer v. Frank.

care on the part of the plaintiff, then, of course, the plaintiff can not recover."

Plaintiff in error argues, that if the combined negligence of plaintiff and defendant caused the accident, there can be no recovery, but that this charge, in effect, instructs the jury that there can be no recovery, if the defendant is free from negligence, *unless* the injury is caused entirely by the negligence of the plaintiff. We do not think the language used by the court warrants the interpretation of the learned counsel for plaintiff in error. In that part of the charge immediately preceding, the court correctly instructed on contributory negligence, and, without attempting to in any way qualify or limit that which had been previously said on that subject, the court was proceeding to devote attention to such matters, as went to *preclude* recovery—not that *warranted* recovery. This is the obviously plain purport of the paragraph objected to, for the court in so many words says, "if the plaintiff * * * *then, of course, the plaintiff can not recover.*" Instead of being in any way prejudicial to plaintiff in error, quite the reverse was true, for the court stated the law, if anything, too strongly in favor of plaintiff in error as against defendant in error. It will be observed the court said: "If the accident was caused entirely by want of due care on the part of the plaintiff, then, of course, the plaintiff can not recover." Counsel objected to the use of the word "entirely."

Suppose, for the sake of argument, that there had been *some* negligence on plaintiff's part, as, for instance, where he had been lulled into believing he was in a place of security, when in fact he was entering a place of danger left open by defendant, or where the plaintiff's negligence is not the proximate or direct cause of the accident—in such event plaintiff would still have been entitled to recover, and the court in the part of the charge now criticised as being prejudicial to plaintiff in error, said that "if the accident was caused entirely by want of due care on plaintiff's part, then, of course, plaintiff can not recover." Could the jury have been misled to plaintiff in error's prejudice? The construction for which counsel contends is not only not war-

ranted by the plain language of the charge, but is not possible at all, unless the charge is read in connection with the word "unless," which counsel *arguendo* interpolates. If the court were to adopt the construction contended for instead of *harmonizing* the charge as becomes its duty, it would find in this construction a flat *contradiction* of that which precedes. It is scarcely possible that the court intended to contradict that which it had previously clearly expressed, or that, in view of that which it had said before, in plain unmistakable language, the jury could have misunderstood. We construe the charge objected to as though the court instructed the jury that the plaintiff could not recover *if* there was no negligence on the part of the defendant or his employes, or *if* the accident was caused entirely by want of due care on the part of the plaintiff. It was not instructing the jury, as plaintiff in error claims, that the plaintiff can recover even though the accident was caused by the combined negligence of plaintiff and defendant, *for if there was no negligence anywhere on the part of the defendant, there could be no combined negligence*. In addition to which the court had already pointed out the following: "If upon the full evidence of the case it appears that the injury was caused directly by want of ordinary care by both parties, there can be no recovery, for the law can not apportion between them." By no implication, unless it be a violent one, aided by the interpolation of words not used by the court, can the charge be interpreted into a condition whereby the plaintiff might recover if combined negligence existed. Considering what preceded, it was simply a recital of a certain state of facts that would *debar* plaintiff from a recovery. In *Ohio & Indiana Torpedo Co. v. Fishburn*, 61 O. S., 608, the court said:

"A charge to a jury is to be construed as a whole, and if construing the whole charge the law of the case appears to have been correctly given to the jury, and in a way that will reasonably enable them to understand the rules of law which they are to apply to the evidence before them, the charge will not be held erroneous simply because every condition to a recovery of a defense is not embraced in each paragraph, and the paragraph excepted to is not in itself calculated to mislead."

1905-6.]

Breuer v. Frank.

In *Curry v. Cincinnati*, 12 Ohio C. C., 736, Swing, Judge, for the court said:

"The charge should be read as a whole and the parts harmonized if possible. It will not do to fish out a clause here and there in a charge and give them an independent meaning, when, if taken in connection with other parts of the charge they would have a different meaning."

See also *Price v. Cobblitz*, 21 C. C., 732; *Toledo Railway Co. v. Gilbert*, 2 C. C.—N. S., 432; *Railway Co. v. Haws*, 194 Ills., 92; *Kunst v. Ringgold*, 116 Mich., 88; *Liese v. Meyer*, 143 Miss., 547; *Railway Co. v. Knapp*, 173 Ills., 219.

Reading the charge then in its entirety, considering the words and language used according to their plain ordinary signification, it becomes a harmonious whole. On the other hand, to adopt the construction contended for, as we have already pointed out, necessitates the interpolation of words, and the meaning then arrived at contradicts the plain words used by the court and renders the whole charge inharmonious and incongruous.

It is also alleged that the court erred in that part of its general charge wherein it said:

"But if you should find, on the other hand, this elevator was out of order, and by reason of that fact it crept up to the upper floor, thereby leaving this pit into which a man might stumble, and that the door leading thereto was open; that the operator whose duty it was to guard that opening was right there; that the man passed him—then it is for you to say whether all these conditions were not such as to excuse any negligence there might have been on his part, and if you find such to be the fact, and the injury was caused by the negligence of the defendant, plaintiff is entitled to recover." (Record, page 364.)

Plaintiff in error objects to the court leaving it to the jury to say whether the facts and circumstances under which the plaintiff below stepped into the open elevator shaft were such "as to excuse any negligence there might have been on the part of the plaintiff." But this was simply instructing the jury that it was for them to determine whether the plaintiff, in walking into the open shaft, under the circumstances was justified in assuming that the elevator cab was there to receive him.

It was equivalent to saying, if you find the door was open * * * * then, under such circumstances it is for you to say whether *the circumstances were such as to lull him into security*, and if so, to excuse his negligence is not looking to see if the elevator cab was there.

Counsel for plaintiff in error contends, that even if it be true that elsewhere in the general charge the law is correctly given, that this does not cure the error arising on the important part of the charge, and that the jury was necessarily misled; that they can not tell which part of the charge to follow, the good or the bad. We have endeavored to show that the parts of the charge given and objected to were not proper, and we think when read in connection with the entire charge the court fairly stated the law in the case. Nor do we find anything in *P., Ft. W. & C. Ry. Co. v. Krichbaum's Adm'r*, 24 O. S., 119, and *R. R. Co. v. Whittaker*, 24 O. S., 642, relied on by plaintiff in error, that causes us to view the matter in any different light. The former case is not in point, because in it the defendant requested the court to instruct the jury, "that if the negligence of the deceased contributed to the injury which caused his death, the plaintiff could not recover, although the defendant was also guilty of negligence." The court ruled that it was error to exclude the charge because "the jury was wholly uninstructed as to their duty in case they found that the negligence of the deceased operated as one of the causes which directly produced the injury." In the case before us, the court distinctly charged the jury that there could be no recovery if the negligence of defendant in error operated as one of the causes which directly contributed to the injury. *R. R. Co. v. Whittaker* is likewise distinguishable. The jury was instructed on contributory negligence that if by the want of ordinary care the plaintiff proximately contributed to the injury "while the defendant was in the exercise of ordinary care in the discharge of its duties in running its train," the plaintiff could not recover. The court said this was misleading, for it implies that the negligence of the plaintiff would not exculpate the defendant unless ordinary care was exercised on its part (page 652).

1906-6.]

Breuer v. Frank.

In the case before us, taking the charge as a whole, it is difficult to see how the charge could have been misleading, for we have seen the court not only charged "there could be no recovery if upon the full evidence it appears that the injury was caused directly by want of ordinary care by both parties, for the law will not apportion between them" (see record, page 357); but the court went further (see record, page 363), and said, "that there could be no recovery if there was no negligence on the part of defendant or his employees." And the court went still further (see record, page 363), and said, "that there could be no recovery if the accident was caused entirely by want of due care on the part of the plaintiff."

Plaintiff in error further objects because the court used the term "excuse" in the charge. The term, "excuse negligence," is used, as we shall presently show, not without high authority. In *Railroad Co. v. Whitacre*, 35 O. S., 627, the term "excuse negligence," is found throughout the opinion, and at page 636-7 the court said—

"A majority of the court after careful examination of the evidence reluctantly come to the conclusion that the jury was not warranted in finding that there existed any reasonable excuse for the plaintiff's failure to use ordinary precautions which the law demands and the plaintiff's injury is the result of this failure."

To the same effect is the language of our circuit court in *P., C., C. & St. L. Ry. Co. v. Peters*, 1 Ohio C. C., 34, affirmed by our Supreme Court without report, 17 Bulletin, 247. See also *Wabash Ry. Co. v. Skiles*, 64 O. S., 458, 2d syllabus; *Penn. Co. v. Mahoney*, 22 Ohio C. C., 469, 481, 486; Thompson on Negligence Vol. 5. par. 6299; Shearman & Redfield on Negligence, Sec. 91; *Hough v. R. R. Co.*, 100 U. S., 224. Of course, it was not for the jury to excuse any negligence of plaintiff, meaning thereby all the negligence, of the plaintiff if any existed; for, if that were true, then all that the court had said on combined negligence was said in vain; but there are circumstances, as already stated, where the law excuses negligence in a plaintiff, and the court was stating nothing more nor

nothing less than just such circumstances, and in unmistakable language it said: "It is for you to say whether these circumstances existed." It is not impossible that the jury could have understood the court to say that they might excuse any and all negligence of the plaintiff. The court distinctly says:

"If, on the other hand, you should find certain conditions existed (enumerating them) then it is for you to say whether these conditions (not *all* conditions but *these enumerated conditions*) excused any negligence there might have been on his part."

That the law excuses negligence under certain conditions see *Kerwhacker v. C., C., & R. R. Co.*, 3 O. S., 195-196; *Meek v. Pennsylvania Co.*, 38 O. S., 632; *Kelly v. Howell*, 41 O. S., 438. But if, for the sake of argument, we were to concede that the charge of the court was open to the objections urged by counsel, and that error was committed, we think it was in no wise prejudicial to the plaintiff in error. We have read the entire record carefully and no where does there appear even a *scintilla* of evidence tending to show any negligence whatsoever on the part of the defendant in error. On the contrary, the evidence • to our mind clearly shows defendant below was negligent, and construing the evidence most favorably was not entitled to a verdict (*Elster v. Springfield*, 49 O. S., 82). In *Ry. Co. v. Fleming*, 30 O. S., 480, syllabus 4, it was said:

"In a case where there is no testimony to show the plaintiff to be guilty of contributory negligence, it is no ground for the reversal of a judgment that the court refuses to charge the jury on the subject of contributory negligence."

In the case before us the court fairly and in our judgment correctly charged the jury on the question of contributory negligence of plaintiff below; still *as there was no evidence whatsoever* tending to show plaintiff below to be guilty of such negligence, defendant could not have been prejudiced, even though the charge was open to the objections claimed. *Copeland v. Hewitt*, 96 Me., 525, syllabus 5.

It is also urged the court below erred in refusing to give certain special charges requested by the defendant below. The

1905-6.]

Breuer v. Frank.

refusal to give Charges No. 1 and No. 2 was proper. These charges implied that, as a matter of law, an elevator is a place of danger. This has been repeatedly passed upon and the contrary view held. *Tousey v. Roberts*, 114 N. Y., 312; *Bank v. Morgolfski*, 75 Md., 432; *Mortgage Co. v. Reese*, 21 Cal., 435; *Stephens v. Chauss*, 15 Canada Supreme Court, 379; *Breuer v. Frank*, 2 N. P.—N. S., 69.

Charges 3 and 5 were also properly refused. These charges and likewise No. 11 raised questions involving the legal duty owing by Breuer to Frank. The court evidently refused to give the charges upon authority of *Breuer v. Frank*, 2 N. P.—N. S., 69. The identical question involved arose on the former trial of this very case, and was passed upon by general term of this court. The Supreme Court, it is true, reversed *Breuer v. Frank* and remanded the cause for re-trial. Notwithstanding the legal questions involved in these special charges were before that tribunal, the cause was sent back for re-trial solely because of the failure to give a certain special charge, which charge involved the question of contributory negligence (there having been some testimony on the previous trial not appearing in the second trial, that plaintiff below pushed the elevator door open). As our Supreme Court expressed no opinion on the questions raised, and which questions are again involved in these special charges, and as it pointed out no error other than the one involved in the failure to give the special charge referred to, we think that the questions here raised may be considered as having been properly determined by the general term in 2 N. P.—N. S., 69. The special charges were, therefore, properly refused.

Charge No. 7 was properly refused because it holds plaintiff to the exercise of "proper care and caution" without explaining what proper care and caution meant. What is proper care and caution in one case may be improper in another.

Charge 10 (record, page 348) was also properly refused, for it was fatally defective, in that it holds the plaintiff to "proper care and caution," whatever that may be.

Charge 11 was properly refused for reason stated under refusal to give Charges 3 and 5.

Finally, it is claimed that the verdict is excessive. The verdict, it is true, is in a very substantial amount and shows a decided increase over the verdict of the first trial. If the plaintiff was entitled to recover at all, he was entitled to a substantial verdict. The verdict given on the first trial may not be a proper criterion on amount, because of additional testimony at the second trial as to the permanency of the injuries and expense incurred. We can not say that the verdict was the result of either passion or prejudice (Section 5305, par. 4), and we therefore know of no reason why the finding of the jury should be disturbed. We find no error prejudicial to plaintiff in error, and we therefore think the judgment should be affirmed with costs.

Alfred B. Benedict, for plaintiff in error.

Stricker & Johnson, for defendant in error.

DISSENTING OPINION.

LITTLEFORD, J.

I am compelled to dissent from the opinion affirming the judgment below.

In a negligence case involving contributory negligence the court is bound to give to the jury, somewhere in its charge, two separate instructions—first, that the plaintiff can not recover unless he has proved that his injury resulted directly from the negligence of the defendant alleged in the petition, and second, that the plaintiff can not recover if his own negligence contributed directly to this injury. Neither of these propositions were laid down separately anywhere in the general charge of the court in this case, but they were both woven together in one sentence, where the court says:

“If you should find from the testimony the elevator was in good condition at the time of the accident, in good repair, not out of repair, that the conduct of the operator, was in all respects what it should have been, that there was no negligence anywhere on the part of the defendant or his employees, that the accident was caused entirely by the want of due care

1905-6.]

Breuer v. Frank.

on the part of the plaintiff, then of course the plaintiff can not recover." Record pp. 363, 364.

This charge is misleading because a jury might well understand from it that if the defendant, being without negligence, can show that the accident was caused entirely by the plaintiff's negligence, then the defendant is entitled to a verdict. This charge is quite like the charge given in *Railway v. Whittaker*, 24 O. S., 642, which was held to be error, even although the jury was correctly charged in another part of the charge. In the case before us the jury were not correctly charged on the two essential points referred to above in any part of the court's charge, the nearest approach being the statement that if there was concurrent negligence (record, 357), the plaintiff could not recover. This omission was prejudicial error, and the giving of that part of the general charge quoted above was also prejudicial error.

In the next place the court instructed the jury that they had the right to find that certain conditions "excuse *any* negligence" on the part of the plaintiff. No language like this will be found in any case in Ohio. The negligence of the plaintiff may not cut any figure because it does not contribute *directly* to the accident, but if it does amount to contributory negligence, the jury have no right to find that on account of surrounding conditions it ought to be excused and eliminated from the case.

It will not do in this case to say that even if the charge is somewhat mixed on the subject of contributory negligence, still there was no harm done because there was no evidence in the case of negligence on the part of plaintiff below. There was evidence tending to show contributory negligence on his part. Frank walked into an open elevator shaft in broad daylight, looking "straight ahead," although he knew the elevator man was out in the hall behind him. If a person chooses to take the risk of stepping into the cab of an elevator where he knows there is no attendant, he ought at least to look and see if the cab is really there. It seems to me that the evidence on this point is such that different minds would reach different conclusions with

reference to Frank's carelessness in the premises, and that it will not do to say that, as a matter of law, he was exercising due care.

Again, the court charged that ordinary care is the care which a *prudent* person is accustomed to exercise under like circumstances. That is not correct. Ordinary care is the care which persons of *ordinary* prudence are accustomed to exercise. *Railroad v. Moreland*, 12 Cir. D., 604.

Charge No. 10, which plaintiff in error insists should have been given, was properly refused because the word "directly" is omitted before the word "contributed." In other words, plaintiff's action is not defeated merely because his negligence contributed *somewhat* to an accident, but it must contribute *directly* to amount to contributory negligence. 60 O. S., 215, 220; 21 C. C., 220.

I do not wish to prolong this dissenting opinion by discussing all the points raised, but on account of the above errors I think this case should be reversed.

1905-6.]

State, ex rel, v. Ellsperman.

CONTEMPT OF COURT.

[Common Pleas Court of Muskingum County.]

STATE OF OHIO, EX REL, v. AD. ELLSPERMAN.

Decided, November, 1905.

Newspaper Attack on Grand Jury—Not Privileged Because Referring to Past Acts—Contempt of Court—Obstruction of the Due Administration of Justice.

1. The publication of charges to the effect that certain indictments returned by a grand jury were procured through fraud, blackmail and bribery does not become privileged matter by reason of the fact that the charges relate to past acts as distinguished from those which are prospective.
2. The grand jury is a component part of the court, and the publication of such charges without evidence upon which to base them is calculated to impede the administration of justice, and is contempt of court for which summary punishment may be visited on the guilty parties.

FRAZIER, J.

In this proceeding the defendant is charged with a contempt of court on an information presented by a committee of the bar appointed by the court. To this information the defendant has pleaded not guilty. The information is as follows:

“That in the county of Muskingum and state of Ohio, on the 15th day of October, A. D. 1905, Ad Ellsperman, as publisher and managing editor and proprietor of the newspaper known as and entitled *The Sunday News*, which paper was and is published on each Sunday, and was and is generally circulated within the city of Zanesville, county of Muskingum, and state of Ohio, willfully and maliciously printed and published in said newspaper a certain false, libelous, scurrilous and scandalous article and cartoon or picture in substantially the words, figures, and pictures following, to-wit: The following are the headlines:

“Infamous attempt of grand jury to blackmail to stop libel indictment.

“Grand jury tries blackmail scheme on publisher *News* to ward off a libel indictment.

“Shameless inquisitors wanted \$300, and, because money was not forthcoming, they indicted Ellsperman—*The Sunday News* sure of its position and ‘there’ll be something doing’ and that very shortly.

"Three hundred dollars paid into the hands of the members of the grand jury, the chief inquisitors and probably one or two witnesses, would have saved the publisher of *The Sunday News* from indictment on the charge of criminal libel, originally brought by Harry L. Greiner, ex-county commissioner and a *Times-Recorder* stockholder.

"The proposal to pay over \$300 to the grand jury, and by that means head off the indictment, was made three times by as many individuals, all of whom are well-known citizens.

"That an indictment was brought against the publisher of *The Sunday News* is due to the fact that he failed to accede to the shameless proposal.

"The indictment was made public last Monday afternoon, after examination had been made of the following witnesses: Harry L. Greiner, Frank B. Fell, W. O. Littick, Finley M. Fleming and Harry W. Cross.

"Three of the above named are ex-county commissioners, one business manager of The Times-Recorder Co. and the latter at one time editor of the *News*:

"The whole business was 'cocked and primed.' With the exception of Mr. Cross, not one of the witnesses was friendly to the man against whom indictment was made.

"The end is not yet. There will be something doing in the very near future.

"The grand jury adjourned to meet November 13, after the election at which time it is expected to make inquiry into Y bridge grafts and other 'minor' questions.

"We will see what we will see."

(The following is the article):

"The present grand jury which adjourned its sessions last Monday afternoon until November 13, is, according to evidence that can be and will be furnished, about as corrupt a jury as ever considered affairs in Muskingum county.

"This charge is not made for the reason that the publisher of *The Sunday News* has been indicted for criminal libel on two counts, but for the reason that he was thrice approached while the jury was in session and told that for a few hundred dollars he could stave off the indictment; that for a few hundred dollars the jury could be persuaded not to give consideration to the case of Harry L. Greiner v. Ad. Ellsperman and favorable to Ellsperman.

"One day last week the publisher of the *News* was approached by a prominent citizen who told him that he could save himself from an indictment at the hands of the grand jury if he would 'dig down and fork over' a few hundred dollars, but the proposition was not considered.

"On last Sunday evening, while the publisher of the *News* was at home assisting in the entertainment of a few friends, he was visited by another prominent citizen, who made a similar proposition, and advised that the matter be given consideration at once.

"A few hundred dollars will settle the matter," said the citizen, 'and you may depend that the jury will not return an indictment against you.'

"Early Monday morning found the publisher of the *News* at the office of his attorney, who advised him to visit the gentlemen in order to determine just who and what was behind the move.

"Acting on his attorney's advice, the gentleman was visited in his office and asked concerning the offer, whereupon information was given

1905-6.]

State, ex rel, v. Ellsperman.

that the matter had taken another form; that he could not talk of it just then, but would be able to do so in fifteen minutes time.

"'Get out of my office and get quick,' was the way the gentleman expressed himself. 'Go to your office at once and I'll telephone you the particulars within fifteen minutes.'

"The publisher of the *News* acted upon the suggestion at once, but he had no sooner reached his office than a telephone message from a friend was received, announcing that he (the friend) had received a summons to appear before the grand jury at 9 o'clock.

"The matter had taken another turn.

"The few hundred dollars had not been forthcoming quite as readily as was expected.

"The grand jury was preparing to examine witnesses and render an indictment.

"The whole business had been 'fixed.'

"The witnesses summoned to be examined were Harry L. Greiner, Frank B. Fell, W. O. Littick, Finley M. Fleming and Harry W. Cross, three of them being ex-county commissioners, one business manager of the *Times-Recorder* Co. and a business associate of Greiner, and the latter at one time editor of *The Sunday News*.

"There was considerable delay in the examination of the witnesses, occasioned, it was said, by the jury awaiting on a witness in another case. During the wait, however, George K. Browning, chief counsel for Harry L. Greiner, was seen to approach the door of the grand jury room, rap thereon, and when it was opened, hand in a bunch of papers.

"Browning had prepared the indictments for the grand jury, and there was nothing left for the members to do but append their signatures thereto.

"Greiner was the first witness to be called, and he was followed by Cross. Then came Fell, Fleming and Littick.

"At 3 o'clock in the afternoon the jury made its report, and among its findings was a charge of criminal libel against the publisher of *The Sunday News*. The charge contained two counts.

"It was quite evident after that that the 'few hundred dollars' had failed to arrive on time.

"When the jury finished its labors, it adjourned to meet November 13—after the election—at which time it is expected to make inquiry into Y bridge grafts. First of all, however, it was important that the publisher of the *News* be indicted—and for two reasons: First, because he failed to 'salve' the jury; and, second, because of the great moral (?) effect the indictment might have upon the forthcoming election.

"Perhaps never before in the history of Muskingum county was anything so nicely 'cocked and primed.' But it failed to work.

"Since that time the publisher has been criticised for his failure to whack up, one citizen declaring in bold terms that he saved himself from indictment by 'salving' the jury.

"A few hundred dollars would have saved us, but we didn't want to be saved that way. Since the indictment has been made we have been busy in an effort to get at the bottom of things, and with the result that we have succeeded pretty well. We do not care to 'lay under' any indictment thus made, and do not propose to.

"From the time libel proceedings were begun, way last April, everything pertaining thereto from the plaintiff's standpoint has been extremely crooked. A *Times-Recorder* stockholder, in the person of Justice J. B. Carson, sat in the preliminary trial; an effort was made to

have the case tried before Judge Jennings, another *Times-Recorder* stockholder; refusal was made to the proposition to have the *Times-Recorder's* stockholders read in court, every objection made by the plaintiff's attorneys was sustained, and an effort was made to have the case thrown into the probate court after it passed from Carson's hands.

"And then it came to pass that the grand jury was tampered with to the extent that it considered the question of libel in preference to considering the Y bridge grafts, lending color to the oft-repeated statement on the part of intelligent citizens that an indictment of libel would have a great moral (?) effect and probably save the day for the Republican county ticket.

"The people have not heard the last of this business.

"There is another day coming, and it's coming soon.

"As above stated, the grand jury has been tampered with, and it is perhaps the most corrupt organization of its kind that ever gave consideration to Muskingum county's affairs."

"That in connection with said written publication, the said Ad. Ellsperman in the said newspaper and in the same publication, printed and published the following cartoon pictures, with the words and figures thereon as appears as set forth below, and on the next page thereof:

"Cartoon showing a bloated, hideous form labeled grand juror over the dead body of the symbolical figure of justice, with the various placards at the side and over the head of the figure of the grand juror, as follows:

"Are you sued? We can fix you up right for ca\$h."

"Verdict\$ made to order. Low prices. \$atisfaction a\$\$ured or money refunded (perhap\$). LEMERT & CO."

"Anything we have at your own price. Ca\$h."

"Decision\$ cheap."

"Come and see us if you have the price."

"Don't ri\$k a trial without con\$ulting u\$. Why pay your ca\$h to lawyer\$?"

"Our term\$ are \$trictly ca\$h."

"Justice a rare bargain, only \$300."

"That prior to and at the time of said publication, certain cause or causes, in which said Ad. Ellsperman was charged with having published a criminal libel of and concerning one Henry L. Greiner, had been certified from the court of a justice of the peace in and for the city of Zanesville, said county, to the Court of Common Pleas of Muskingum County, and the grand jury of said county was prior to and at said date in session and engaged in the discharge of its duties in examining into crimes and offenses alleged to have been committed within the said county of Muskingum and state of Ohio; and at the time of said publication, said grand jury had found and presented two indictments against the said Ad. Ellsperman, in which said in-

1905-6.]

State, ex rel, v. Ellsperman.

dictments said Ad. Ellsperman was charged with the offense of publishing a criminal libel against the said Henry L. Greiner, and said indictments are numbered 1327 and 1328 on the criminal docket of said Court of Common Pleas of Muskingum County, Ohio, and were pending at the time of said publication and are still pending in said court for disposition and trial according to law. And that said grand jury has not yet completed its work, and has, under the orders of the court, adjourned and suspended its work until the 13th day of November, 1905, when under the order of the court it will resume its work of examining into alleged crimes and offenses against the laws of the state of Ohio, alleged to have been committed in said county.

"That said newspaper article, words, figures, and pictures were false in all of its charges against the court, said grand jury, and the members thereof, and each member thereof, and that said publication of said article, words, figures, and pictures was made with the intent to insult and intimidate and degrade the said court of common pleas as constituted and the grand jury and each member thereof, so in session as aforesaid, and engaged in the discharge of its duties under the order of the court, and was intended to destroy the power and influence of said court and grand jury, and thus to bring the said court into contempt, and to inflame the prejudices of the people against the said court and grand jury, and to intimidate and prejudice the court and grand jury and the members thereof, and the jurors of the county who shall hereafter be impaneled for the trial of said indictments against the said Ad. Ellsperman, and to prevent a fair and impartial trial of the said indictment against the said Ad. Ellsperman.

"That the said Ad. Ellsperman printed and published in the said newspaper, *The Sunday News*, on the 15th day of October, 1905, the said false, scurrilous, and libelous article, words, figures, and pictures, as hereinbefore described and set forth, and circulated the same within the city of Zanesville and in and about the county, and throughout said county, amongst officers of the court, witnesses and jurors, and persons liable under the law to be impaneled in this court as jurors, and amongst the people generally, and thereby obstructed and still obstructs the administration of justice.

"And so the said relators charge and say that the said Ad. Ellsperman then and there and thereby became and was and is guilty of contempt of this Court of Common Pleas of Muskingum County, Ohio, contrary to law, and against the peace and dignity of the state of Ohio."

It appears from the evidence introduced in this case that some time in April or May, 1905, two criminal cases were begun before J. B. Carson, justice of the peace, each charging the defendant with the offense of criminal libel. A hearing was had before said justice in each of said actions, with the result that the defendant in each of said actions was duly recognized to the court of common pleas of this county. In both cases, a transcript of the proceedings had in the justice's court was filed in this court on the 6th day of June, 1905, and said causes were numbered 1327 and 1328 of the criminal causes of this court. The defendant, in each of said cases, entered into a recognizance for his appearance at the October Term of this court.

On the first day of the October Term of this court, to-wit: October 3, 1905, the present grand jury was duly impaneled, sworn and charged by the court. On the 11th of October the grand jury made a partial report of its work and took a recess until the 13th of November, 1905, at which time it was directed by the court to return. At the time the grand jury was impaneled the court charging the grand jury touching the law of criminal libel. This appears from the evidence introduced in this case.

Subsequently on the 11th day of October, 1905, the grand jury returned into this court an indictment in each of said cases, 1327 and 1328, charging the defendant with criminal libel. Those indictments have been ever since said date, and are now, pending awaiting trial.

The articles and matters complained of as contempts were published in *The Sunday News* of October 15, 1905. The defendant admits that he is the proprietor and publisher of *The Sunday News*. He admits that before publication was made, he knew indictments were returned against him. He admits that he knew there would be headlines in *The Sunday News*, but testified that he did not compose and that he did not know what the headlines would be.

The defendant admits that he saw and approved the article in question. He does not testify as to his knowledge of the cartoon.

1905-6.]

State, ex rel, v. Ellsperman.

Not a syllable of testimony offered in the case tended, in the remotest degree, to prove that any juror of the grand jury was corrupt or in any way connived at any blackmail or bribery or corruption or was in any manner guilty of any misconduct. The defendant offered no evidence to justify the headlines or the substance of his article or cartoon, that any grand juror had been approached by any person or that any member of the grand jury or the prosecuting attorney, directly or indirectly, made any attempt at blackmail or sought or solicited any bribe. Such evidence as he did offer at the hearing was upon the theory that it went to mitigation only.

Every member of the grand jury and the prosecuting attorney came upon the witness stand and testified not only that they were not guilty of the matters imputed to them, but that they had no knowledge or hint of the things imputed to themselves, and that they had no knowledge or hint of any misconduct on the part of anybody.

The most that the defendant claims is that, in conversations with Perry Smith, W. S. Bell, and with his attorney, he was led to believe that the grand jurors could be corrupted. Both of these persons, Smith and Bell, at the hearing testified denying that they had any such conversation with defendant as he claims, and his attorney made his professional statement in open court denying that he ever suggested to the defendant the matter of corrupting the grand jury to prevent an indictment against him. Even if the defendant's claims are true and he had the conversation he claims he had with Smith, Bell and his attorney, there is not the least thing to show or to warrant any belief or assumption that the grand jury, or any member of it, was corrupt or attempted blackmail or bribery to prevent an indictment against him. The imputation against the grand jury was as baseless as it was vile, as unwarranted as it was malicious.

Assuming that the defendant had the conversations with Bell Smith, and his attorney as he himself relates them, by what process of reasoning—I will not call it reasoning—by what process even a disordered imagination could have arrived at a conclusion that the grand jury was corrupt, I know not. It

is gratifying to the court, and must be gratifying to every lover of good government, order and decency, that there is not even the ghost of an attenuated shadow of a circumstance or fact offered in the evidence to warrant even an insinuation of corruption against that body or the officers with reference to the finding and return of said indictment, nor do his counsel claim there was.

Under the plea of not guilty, the defendant urges:

1. That the publication, cartoon and headlines do not constitute a contempt of court.

2. If the court should be of the opinion that the said publication and cartoon do constitute a contempt of court, the defendant makes public apology.

3. The defendant asserts that he did not intend any contempt of the court.

Counsel for the defendant contend that the matter published, including the cartoon, was spoken of the grand jury; that the work of the grand jury was completed when the indictments against the defendant were returned into court; that the matter being at an end so far as the grand jury was concerned, then no matter what the defendant might say of the grand jury, it was absolutely privileged and could not constitute a contempt of court.

If the language of the headlines, articles and cartoon appearing in *The Sunday News* can be interpreted only as a reflection upon the grand jury, and if it be assumed that the labors of the grand jury were at an end when the indictments were returned, then it must be conceded that counsel for the defendant have some authority to support their position, notably the case of *Storey v. The State*, found in 79 Ills., p. 45. Paragraph 4 of the syllabus of said case is as follows:

“The publication of a libel on a grand jury or on any member thereof in relation to an act already done by them in their official capacity, but which has no tendency directly to impede, embarrass, or obstruct the grand jury in the discharge of any of its duties remaining to be performed after the publication is made, can not be summarily punished as a contempt of court.”

1905-6.]

State, ex rel, v. Ellsperman.

On the other hand, the Supreme Court of Indiana, in the case of *Fishback v. The State*, found in 30 N. E. Reports, p. 1088, has decided directly to the contrary. The reasoning by which the Supreme Court of Illinois reaches its conclusion in the Storey case is diametrically opposed to the reasons advanced by our Supreme Court in the Myers case, 46 O. S., p. 491, and other Ohio cases, as to the inherent powers in courts of general jurisdiction to punish for contempt.

The Illinois case, when carefully analyzed, will be found to have its limitations, viz.: That the matter published must relate solely to an act already done; that the matter published must have no tendency directly to impede, embarrass, or obstruct the grand jury in the discharge of its duties remaining to be performed after publication is made.

The present grand jury was in session, as shown by the records introduced, at the time the publication was made, it having been excused temporarily until the 13th of November. The two reports of the grand jury prior to their recess show, by their own terms, that they are partial reports only, not final. The grand jury, therefore, at the time of said publications, had labors yet before it unperformed. The article itself shows that the defendant knew that the grand jury was to resume its labors on the 13th of November, for it says, "The grand jury adjourned to November 13—after the election—at which time it is expected to make inquiry," etc.

It is true that some courts have held that they acquire jurisdiction to punish for contempt only when the contempt relates to some matter pending before the court; that where publications and contemptuous matters relate to an act of the court already done, then no matter how vile or infamous the attacks may be, the court is powerless to act by way of a contempt proceeding.

A recent decision of the Supreme Court of Missouri (1904) utterly refutes and repudiates this doctrine. This decision will be found in 99 American State Reports, beginning on page 624, and is more than fifty pages in length. The court, in this case, reviews elaborately all the cases from the year books to the time of the decision, and asserts the law to be that—

"1. Criminal contempts are all facts committed against the majesty of the law or against courts as an agency of the government, and in which, therefore, the commonwealth and the whole people are concerned.

"2. Scandalizing a court is itself a criminal contempt, and the contempt need not relate to a cause that is still pending.

"3. The liberty of the press means that anyone can publish anything he pleases, but he is liable for the abuse of this liberty: if he does this by scandalizing the courts of his country, he is liable to be punished for contempt of court. A newspaper article scandalizing the court and abusing one of the parties to a cause still pending by charging bribery and corruption is both a civil and a criminal contempt."

In this decision, the court rests its conclusion upon the broad ground that it is a public wrong, a crime against the state, to libel a court, whether for present or past acts, because such conduct most effectually obstructs the free course of justice, tends to impair confidence in the administration of justice, and to destroy the power of courts so essentially necessary to the good order and well being of society.

It is certainly strange reasoning that reaches a conclusion that conduct will constitute contempt that has reference solely to an act being done, while the same conduct referring to an act after it is done would not constitute a contempt. The difference exists in idea only; for whether before or after an act is done, libelous and contemptuous conduct has the same potency for evil. The injurious consequences, so far as the court and the public are concerned, are identically the same. Contemptuous conduct after an act of the court is just as effective to destroy the power and influence of the court, to impair public confidence in it, as before or during the progress of the act.

What is here stated is intimately related to another matter, viz., the so-called liberty of speech and press guaranteed by our Constitution. Newspapers have no greater rights than individuals. It is just as offensive against the law, morals and religion to lie in print as by the lips. By liberty of speech is not license to lie. Liberty in this connection does not mean licentiousness. The phrase "freedom of speech," means nothing more than freedom from censorship. Every one is privi-

1905-6.]

State, ex rel, v. Ellsperman.

leged to speak or write what he pleases without the matter being vised by censors, but he is responsible for the abuses of that privilege. If that abuse is directed against a court, it becomes a contempt of court.

It was testified to by defendant and argued by his counsel, that the language and cartoon has no reference to the court, that it can be construed as having reference to the grand jury only. The grand jury is a component part of the court itself in its criminal jurisdiction and procedure. The grand jury is as essentially an instrumentality of the court as the judge who sits on the bench. Judges and grand juries come and go; change and die; the court lives. Libelous, scurrilous attacks upon a grand jury are, therefore, attacks upon the court itself. It might as well be said that a blow upon the arm of a person does not affect the body, as to say that an assault on a grand jury is not an assault on the court.

The gravamen of the charge contained in the information is that the defendant, by these publications and cartoons, hinders, obstructs, and impedes the due administration of justice, not only because they directly tend to impede, embarrass and obstruct the grand jury in the further prosecution of its labors, but that the matter complained of will likewise directly tend to impede, embarrass and obstruct the due and orderly administration of justice with reference to the trial of the defendant upon the two indictments against him, to degrade the court, destroy its power and influence, to prejudice the people against the court, to lead them to believe that the indictments so returned by the grand jury are the result of fraud, blackmail, bribery, and that a trial on them will be nothing more than an outrage upon justice.

Criminal actions were pending in this court against the defendant ever since the time transcripts of the proceedings in the lower court were filed in this court. These criminal actions were pending before the grand jury and were by the grand jury simply transformed from the form of affidavits in the lower court into indictments in this court. The charges are the same, only different in form. The defendant knew that indictments were pending against him when he made his publications, and

all the matters published and the cartoon are an attack upon the justice and validity of the indictments in the actions pending against him. According to the publications and cartoon, the indictments are the result of bribery, corruption, and for base political purposes. The said publications, headlines and cartoon directly tend to enhance the difficulty of securing an impartial jury to try the indictments, and thereby impede and hinder the due and orderly administration of justice.

As is stated in the Myers case, by our own Supreme Court, the defendant "was not justified in resorting to such means to right any real or imaginary wrong in respect to the finding of an indictment. An indictment secured by improper means or by an illegal body can be reached and set aside by plea in abatement which searches the record." (46 O. S., p. 490.)

The contempt complained of is technically termed an indirect or constructive contempt, *i. e.*, one not occurring in the immediate presence of the court. It is stated by Bishop in his work on Criminal Law, Volume 2, Section 259:

"The general doctrine is, any publication whether by parties or strangers, relating to a cause in court, which tends to prejudice the people as to its merits, to embarrass the administration of justice, may be visited as a contempt, and this includes reflections on the tribunal or its proceedings, or on the parties, the jurors, the witnesses or the counsel.

"Among the inherent powers of a court of superior jurisdiction is that of maintaining its dignity, requiring obedience to its process, rebuking interference with its business, and punishing unseemly behavior. This power is essential to the very existence of the court."

The duties of a grand juror are irksome at best. Most men dislike such service and seek to avoid it. The position becomes all the more unbearable if it is understood that the grand jurors can be assailed and villified for their acts through the press.

After a careful consideration of the whole matter, upon review of all the authorities, I am satisfied that the matter complained of constitutes a contempt of court and that no improper evidence was admitted at the hearing. The defendant through his counsel

State, ex rel. v. Ellsperman.

he did not intend to be in contempt. It is a
w that every one is held to intend the natural
consequences of his own voluntary acts, unless
circumstances proved show the contrary. My
the natural, probable and direct effect of the
of was to impede the grand jury in the
labors, to embarrass the due and orderly
with reference to the pending cases
an outrageous insult to the grand
court itself.

the Fishback case that—

blous, admitting of but one fair
! requiring no innuendo, then
nce to say that in such a case the
the publication but deny the plain and
meaning, of that which the language used con-

The language used in the headlines and articles, and the imputations in the cartoon are libelous *per se*.

As proprietor and manager of *The Sunday News*, the defendant must be held responsible for the injurious consequences of the defamatory matter appearing in his newspaper. All authorities agree upon this proposition.

What punishment should be meted out to the offender?

After careful consideration of the whole matter, I have determined that the sentence in the present case shall be that the defendant pay a fine of \$250 and the costs of prosecution and that he stand committed to the work house until said fine and costs are paid or secured to be paid or defendant be otherwise discharged as provided by law.

John J. Adams, John R. Stonesipher and John Whartenby,
for plaintiff.

Eugene O'Neal and H. R. Shepard, for defendant.

Archdeacon, Adm'r, v. Gas & Electric Co. [Vol. III, N. S.]

**ABATEMENT OF ACTION THROUGH INCOMPLETE
APPOINTMENT OF ADMINISTRATOR.**

[Superior Court of Cincinnati, General Term.]

CORNELIUS ARCHDEACON, ADMINISTRATOR, v. CINCINNATI GAS &
ELECTRIC CO. ET AL.

Decided, January 12, 1906.

*Administrator—Authority of, to Bring Suit for Wrongful Death—
Dates from Completion of Appointment—Action Rendered Nuga-
tory by Failure to Give Bond—And the Bar of the Statute Runs
Against the Beneficiaries—Conditions Precedent to Jurisdiction—
Sections 6134 and 6135.*

An action for wrongful death will not lie until the appointment of the administrator has been completed, and where completion of the appointment is delayed by failure of the administrator to give bond for more than two years, the right of action is abated by the statute, which runs against the beneficiaries without interruption from the date of the decedent's death.

*Affirming *Archdeacon, Admr., v. Cincinnati Gas & Electric Co.*,
3 N. P.—N. S., 45.

FERRIS, J.; LITTLEFORD, J., and HOFFHEIMER, J., concur.

The plaintiff in error was the plaintiff below, and the defendant in error was the defendant below. The case seems not to have been heard on its merits, but a hearing was had on facts set forth in a special answer, in the nature of a plea of abatement under the following facts:

It was made to appear that on February 5, 1903, application was made in the probate court for letters of administration on the estate of John Archdeacon. The administrator signed his bond but gave no sureties. Letters of administration were as a consequence not issued to him. But on the 28th day of March, 1903, suit was filed by the administrator, alleging his appointment and seeking to recover for wrongful death of the decedent, John Archdeacon. Defendant thereupon filed an answer admitting plaintiff's appointment and qualification as administrator, but denying liability. Thus the case stood until March 10, 1905, when plaintiff's attention was called to the omission made by him in the matter of his failure to have proper sureties and consequent lack of letters of administra-

1905-6.]

Archdeacon, Adm'r, v. Gas & Electric Co.

tion. The case came on for trial on March 13, 1905, when defendant sought and obtained leave to file an amended answer denying the appointment of the administrator, and thereupon filed a motion to dismiss the action, which motion was by the court regarded as a plea in abatement, and upon hearing the court found the facts to be as above stated, rendered judgment upon the pleadings and dismissed the action; to all of which plaintiff duly excepted. No exception, however, appears to have been taken to the action of the court in permitting the filing of the amended answer setting up the plea in bar that the plaintiff was without legal capacity to maintain the action.

The court below construing Sections 6134 and 6135 found that the conditions precedent constitute a part of the cause of action and must, therefore, be performed before cause of action accrued and remedial rights arose and further found that the words "creating rights" under the provisions of this section, being unknown to common law, should be given an effect in harmony with the words used to accomplish the purpose intended, and that the limitation of two years within which an action should be brought for the recovery of damages in case of wrongful death was an essential condition of the right of action, in all of which we concur.

Our attention has been drawn to the fact that, under the authorities collated in the American & English Encyclopædia of Law, Vol. 11, page 908, the title of the administrator to property of his intestate relates back and takes effect from the time of the death of the decedent, legalizing all acts otherwise valid done by the administrator before his appointment and vesting in him a cause of action accruing between the granting of letters and the death of the intestate. Section 6135 provides, with reference to such action, that, "it shall be brought in the name of the personal representative of the deceased person within two years after the death of such deceased person."

This limitation of two years was held in the case of *Railway v. Hine*, 25 O. S., 629, "to be a *condition* qualifying the right of action, and not a mere limitation of the remedy. It is, therefore * * * a necessary condition to the right of action." (*Wolf, Administrator, v. Railway Company*, 55 O. S., 529).

Archdeacon, Adm'r, v. Gas & Electric Co. [Vol. III, N. S.]

The court also holds such administrator thus appointed to be a mere nominal party, having no interest in the case for himself or the estate he represents, and there being no estate in being, and consequently no assets of any kind, but the entire object of the statute referred to being for the purpose of creating an estate, it is held that the rules referred to in the 11th American & English Encyclopædia of Law are not applicable (28 O. S., 191).

In reaching these conclusions, by which we concur with the action of the court below in holding the plea in abatement good; we have not overlooked the salutary rules that govern in matters of a surrogate nature, where the acts of a *de facto* administrator have been given full force and effect as if done by a *de jure* administrator, but we believe as to those as well as to the acts of an administrator *de son tort*, when properly done, that such rules do not contravene the necessity found by the court below, of making strict construction of the statute regarding the action as begun only when conditions precedent have been fully complied with.

We see no error and therefore concur in the conclusions of the court as found in 3 N. P.—N. S., page 45.

W. A. Rinckhoff, D. T. Hackett and Chas. M. Cist, for plaintiff in error.

Outcalt & Foraker, Jos. W. Heintzman and Smith Hickenlooper, for defendant in error.

AUTHORIZATION AND SALE OF WATER WORKS BONDS.

[Common Pleas Court of Licking County.]

CHARLES VADAKIN, ON BEHALF OF THE CITY OF NEWARK, v.
ANDREW J. CRILLY ET AL.*

Decided, March, 1905.

Municipal Corporations—Water Works Bonds—Advertisement of and Offer of at Public Sale—Bids Withdrawn Because of Injunction Suit—Bonds then Sold at Private Sale—Tax-payer Suing in Interest of Competing Water Company—Without Standing in Court—Section 123, Municipal Code.

The sale of a duly authorized issue of water works bonds having been enjoined, the city auditor declared the sale off, and the bids for the bonds were withdrawn by those from whom they had been received. Thereafter, a demurrer having been entered to the petition for an injunction and the petition dismissed, the bonds were sold by the finance committee at private sale. *Held:*

1. That authority having been once given by council for the sale of these bonds, and the attempted public sale made in good faith having failed, the withdrawal of the bids did not work a rescission of the steps which had preceded, and it was not necessary to secure further authority from council in order to render valid a sale of the bonds at private sale.
2. A suit by a tax-payer, brought under the circumstances of this case, must be treated as brought in the interest of the competing water company, and a plaintiff tax-payer thus situated has no standing in court.

SEWARD, J. (orally).

This action is brought to enjoin the delivery of \$300,000 of the city's bonds to alleged purchasers, or if the same have been delivered, to enjoin Denison, Prior & Company and Season-good & Mayer from selling or disposing of the same; and, upon final hearing, that the bonds be ordered to be delivered up and canceled, and that the defendants, if the money has been paid in, be restrained from paying the same out.

*Affirmed by the Circuit Court, *Vadakin v. Crilly et al.*, 7 C. C.—N. S., 341; affirmed by the Supreme Court, without report, 73 Q. S., —.

By an amended petition, the Cleveland Trust Company is made a party, and the plaintiff alleges that he has information that the bonds have been placed with said company as security for what it was to advance on the same; that the bonds are not satisfactory in form; and that it is the intention to have other bonds issued, etc. The sinking fund trustees are made parties.

An injunction is prayed for against A. J. Crilly and Frank T. Maurath, restraining them from signing or affixing the corporate seal of the city of Newark to any bonds under the ordinance of May 16, 1904, or other bonds of said city, providing for the erection of water works, or any bonds in lieu of or to take the place of said bonds.

The sinking fund trustees are enjoined, with Maurath, their clerk, from registering bonds under said ordinance.

The board of public service is enjoined from making any contract or incurring any liability or obligation on behalf of said city, or paying out any money realized from the sale of the bonds.

The petition alleges that prior to November 15, 1904, by proceedings according to law, the council had authorized the sale of bonds of said city to the extent of \$300,000 of the denomination of \$1,000 each, interest at 4½ per cent., to become due and payable at such time as the ordinance provided; that Crilly was mayor, Maurath was the auditor, and that Jones and Moser were a majority of the finance committee; that Denison, Prior & Company and Seasongood & Mayer are partnerships; that on November 15, 1904, Maurath caused notice to be published of the sale of said bonds at public sale, all bids to be delivered at his office on or before noon of December 15, 1904; that demand was, on the 12th day of December, 1904, served on Philip B. Smythe, city solicitor, to bring an action to enjoin the sale of said bonds on December 15, 1904, because thirty days would not have elapsed between the day of publication and the day of sale; that the solicitor brought the suit on the 14th of "November" (should be December) to restrain the sale of the bonds; that Judge Coyner granted a temporary restraining order restraining the sale of the bonds; that Maurath, upon service of

1905-6.]

Vadakin v. Crilly et al.

summons, declared the sale of bonds off and returned the bids of a large number of bidders; that on the 16th or 17th Frank A. Bolton filed a demurrer at the request of Philip B. Smythe; that on the 17th day of December, Smythe and Bolton conspired together, and had, without the consent, knowledge or order of the court, an entry put upon the records of the court sustaining said demurrer and dismissing the petition; that the defendants conspired together to the great detriment and damage of the city and its citizens and tax-payers, to sell said bonds at private sale to Denison, Prior & Company and Seasongood & Mayer, at a much less price than they would bring at public sale, and without any authority of law to make such private sale; that on the 19th of December Crilly, Smythe, Maurath, Jones and Moser pretended to sell the bonds to Denison, Prior & Company and Seasongood & Mayer for \$310,150, and Crilly and Maurath pretended to execute them on behalf of the city; that the bonds were never registered; that there was no authority to sell at private sale, the bonds never having been offered at public sale; that the sale was for ten thousand dollars less than they were worth or could have been sold for at any time; that at the time the bids were declared off, no action was taken in any way by the city council, nor at any time, nor were the bids offered under said notice or at all presented to said council, or opened or acted upon by the council; that on the 21st day of December, demand was made upon Smythe to bring the suit, and he failed to do so; that he conspired with the defendants in a scheme to accomplish said unlawful private sale, and the same was consummated under his advice.

The defendants have all answered, each denying all conspiracy and illegality in the sales. A motion is made on behalf of the defendants to dissolve the injunction:

1. Because the allegations of the petition and amended petition, in so far as they are denied, are untrue.
2. That the allegations of the several answers are true.
3. Because the injunction prevents the city from paying interest due upon the bonds, January 1, 1905, demand having been made therefor by the owners and holders of said bonds.

4. Because the injunction prevents the city from using the money now in its treasury for the purpose authorized by law and the ordinances of said city.

5. Because the action is not brought in good faith, but in the interest of the Newark, Ohio, Water Company, contrary to the express will of the electors of the city.

6. Because said injunction was wrongfully allowed.

So that the questions submitted to the court are:

1. As to the legality of the sale.
2. As to the good faith of the plaintiff.
3. As to the good faith of the defendants in the sale of the bonds.

4. As to the failure of Smythe to bring the suit.

As to the third and fourth grounds of the motion—that is, that the city is prevented from paying the interest and from using the money in the treasury, the proceeds of the sale, for the purpose authorized by the ordinances—while most important to the city and to the citizens, yet they can have but little, if any, force if the sale should be found to be illegal.

We will take up the questions raised in the order in which they have been stated.

First, as to the legality of the sale: There certainly can be no question but what the bonds were sold at private sale and the proceeds of the sale are in the treasury of the city, amounting to \$316,525, made up as follows: Face of bonds, \$300,000; accrued interest, \$6,375, and premium \$10,150. This is satisfactorily established from the testimony.

Was the sale made in substantial conformity to the laws governing in the sale of such bonds? Section 97 of the code provides that such bonds shall first be offered by the municipal corporation to the trustees of the sinking fund, in their official capacity, at par and accrued interest, and only after their refusal to take all or any of such bonds, at par and interest, *bona fide*, shall they be advertised for sale.

“All sales of bonds other than to the sinking fund shall be to the highest and best bidder, after thirty days’ notice in at least one newspaper of general circulation in the county where such municipal corporation is situated, setting forth the nature,

amount, rate of interest and length of time the bonds have to run with the time and place of sale.”

What are the necessary prerequisites and precedent conditions to an offer or sale at private sale, and have they been complied with?

1st. They must be offered to the trustees of the sinking fund commissioners at par and accrued interest. This was done. 2d. They must refuse to take any or all of them at par and accrued interest. This was done and gives the right to advertise for public sale or offer to sale to the highest and best bidder, after thirty days notice.

This part of the section provides that notice of such sale shall be published thirty days before the day of sale in at least two newspapers of general circulation in the county, and shall set forth the nature, amount, rate of interest and length of time the bonds have to run, with the time and place of sale.

This court has held, in the case of *Philip B. Smythe, Solicitor, v. Crilly et al*, that this notice contained all the requirements of the statute, to-wit: The nature of the bonds was set out; the amount, rate of interest and length of time to run with time and place of sale, and that the notice was published for the thirty days required. So that if a restraining order had not intervened, and the sale had been made under the bids on file on that day, December 15, 1904, to the highest and best bidder the contract would have been binding on both the city and the bidder.

The offer to sell at public sale was complete in all its parts up to, at the furthest, within one minute of the time when the sale could have been completed and made, if not up to within a few minutes after the time when the sale could have been completed. The sheriff's return shows that the injunction was served at 11:59, while Smythe, Moser, Jones, Maurath and Davis testified that the clock had struck twelve before the sheriff made service.

That restraining order allowed in *Smythe, Solicitor, v. Crilly et al, supra*, was groundless, without merit, either in law or fact, and should never have been granted and undoubtedly

would never have been granted if the court had had the time to scrutinize the petition with care; but the restraining order was granted and it was the duty of the parties to obey it, right or wrong, and they did.

The first subdivision of Section 97 provides for sale at private sale, and says:

“When any such bonds have been once so advertised and offered (that is, as is provided for public sale) and the same or any part thereof remain unsold, then said bonds, or as many as remain unsold, may be sold at private sale, at not less than their par value, under the direction of the mayor and the officers and agents of the corporation by whom said bonds have been, or shall be, prepared, advertised and offered at public sale.”

It is claimed by counsel for plaintiff that the withdrawal of bids would be a rescission of all that had gone before, and that the bonds could not thereafter be sold at private sale without authority of council to sell at private sale; that the mayor and finance committee were without authority to act after withdrawal of bids, and that they must make their report to the city council and get its authority to sell at private sale; that the ordinance authorizing the sale provided for a sale at public sale only, and after that was declared off, nothing further could be done towards effecting a sale without additional or new authority from the city council.

I do not think this contention can be maintained. I am cited to the case of *The Gas & Water Company v. Elyria*, 57 Ohio State, 374, decided in 1898. In this case it was sought to enjoin the issue and sale of bonds because of certain irregularities, among which was the attempt to authorize the mayor to sell them, and give him discretionary power as to time and manner of sale. The Supreme Court say, at page 382:

“This discretionary power belongs to the council, and can not be delegated by ordinance or otherwise to any person or body.”

Section 1693 at that time provided that the power or authority to make a contract, agreement or obligation to bind the corporation, or to make an appropriation, shall not be delegated.

This section was repealed October 22, 1902, and before the passage of the ordinance authorizing this sale.

While the Supreme Court do not refer to Section 1693, I know of no other section expressly prohibiting the delegation of such authority. The court also say that the provisions of the ordinance in that case were in conflict with Section 2837a, passed May 19, 1894, which provided that when the issue of bonds have been authorized under Section 2837, the corporation may provide by ordinance for their sale in not more than four different series, and at not more than four different times. That section, that is, 2837a, was repealed April 29, 1902 (see 95 O. L., 322), and can have no force now.

Section 123 of the new code provides that the powers of the council shall be legislative only, and it shall perform no administrative duties whatever, and it shall neither appoint nor confirm any officer or employe, except as otherwise may be provided in this act.

All contracts requiring the authority of the council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matter to which they relate. And after authority to make such contract has been given, and the necessary appropriation made, council shall take no further action thereon.

This was passed in October, 1902, and went into effect May 4, 1903, and it is a radical departure from the old provisions of the code where almost everything must be approved by the council. It provides, as will appear, that *all* contracts requiring authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given, the council shall take no further action thereon.

Section 2 of ordinance passed May 16, 1904, says: Said bonds shall express upon their face the purpose for which they were issued, and that they are issued in pursuance of the ordinance. They shall be prepared, issued and sold and delivered under the direction of the finance committee of the council and the city auditor, and shall be signed by the mayor of said city and the

city auditor, and shall be sealed with the corporate seal of said city; and the interest coupons attached to said bonds shall be executed by the city auditor, with his signature thereto, or he shall have his signature printed or lithographed thereon and shall be registered in the office of the sinking fund trustees.

Section 3 provides that in case the bonds are not taken by the sinking fund trustees, they shall be advertised for public sale.

As I have before said, it is claimed that this ordinance was exclusive and gave authority to sell only at public sale.

I do not so construe this ordinance and the statutes as to find that no authority was given by the council to sell except at public sale. The statute provides that if offered at public sale, and unsold, that they may be sold at private sale; and it seems to me that power to sell given by the council, if unrestrained, would carry with it the power to sell in any manner prescribed by the statute, providing the council had the right to delegate the power to sell, and there is no doubt in the mind of the court on that proposition.

As to the point made by plaintiffs counsel, that a withdrawal of bids worked a rescission of all that had preceded, I entertain a different view from counsel on that point.

The evidence shows that seven bids were filed, and after the service of the injunction they were withdrawn; that at least one of them contained a certified check for \$30,000.

My view is that any bidder would have the right to withdraw his bid at any time before its acceptance, and that such withdrawal would not affect the proceedings. The bidder is in no way liable to the city unless he fails, after acceptance of his bid, to receive and pay for the bonds; this is the condition upon which he deposited his certified check for \$30,000.

The next question bearing upon the legality of the sale is: Were the bonds once advertised and offered at public sale? If they were not, then the private sale could not be legal, for the law provides that they can not be so sold until after they have been so advertised and offered. There is no question but that they were advertised; so that the sole remaining question

1905-6.]

Vadakin v. Crilly et al.

on that branch of the case is: Were they offered in the sense of the requirement of the statute?

Bouvier defines an "offer" in reference to a contract as: "A proposal to make a contract." In this case the offer is a proposal, by advertising, to sell the bonds; and if made in good faith, with the intention of receiving bids and effecting a sale, then the offer is complete, although no bids are received, or although all that had been received had been withdrawn.

What was the effect of the injunction served on the day of sale? Its legal effect was to stop the sale, so that the bids could not be acted upon. It did not necessarily result in the withdrawal of the bids; that was a matter for the bidders; but there is no doubt but what it did result in their withdrawal. The bidders could have left their bids with the auditor until after the injunction had been dissolved, to be then considered; but they did not see fit to do so.

The sheriff's return shows that this writ was served at 11:59, and he says it was served about that time. Smythe, Maurath, Jones and Davis testify that it was not served until after the clock had struck twelve. The difference in time of different time-pieces might account for the difference in the testimony in this regard. Mr. Anderson does not seem to have any distinct recollection of the time outside of the record.

Holding as I do, that the bonds were advertised and offered, and that the bidders had the right to withdraw their bids before acceptance, the time is not so material, especially when it is a question of one minute.

As to the good faith of the plaintiff in this case: The testimony shows that the first suit was instituted by the plaintiff at the instance of Mr. Veach, who was and still is the superintendent or manager of the water company. There is no evidence that the plaintiff ever thought of bringing the suit until he was approached and importuned by Mr. Veach. The plaintiff had not consulted counsel; Mr. Veach had. He had importuned Mr. Donovan, at Mr. Donovan's residence, some nine or ten days before. Mr. Donovan says he asked Veach if it would not be better to bring the suit so that it would be heard before the time of sale (and this, I must say, was not an unreasonable sugges-

tion to a mind actuated by a purpose whose only object was to see that the proceedings were legal). If there was anything illegal about the proceedings, why not have it determined before the day of sale?

Mr. Veach said: We don't want the sale. If we can stop the sale, Mr. Miller will have the ordinance for the sale of the bonds repealed by the council. Why repeal the ordinance authorizing the sale if there was only a mere irregularity in the notice? Why prevent the sale by the repeal of the ordinance? If the advertisement was insufficient, why not let them re-advertise? Let his further talk with Mr. Donovan answer. Mr. Donovan says that Mr. Veach said: "If the bonds were sold the money had to go to the building of a new water works, and we will see that there is no other ordinance again giving them power to sell the bonds." Mr. Veach does not deny this conversation with Mr. Donovan. He says himself that he endeavored to have the council repeal the ordinance for the sale of the bonds. That his *whole object* was to get an opportunity to have the water works plant appraised with a view of seeing if it could not be sold to the city. "If it could not be sold, I had no objection to the issuing of the bonds; until I could get them to present the matter to the city council." He says: "Nothing else has ever been in my mind."

When asked whether the sole object has not been simply to get the council to investigate the plant so as to come to some conclusion as to whether they could buy it at a profit," this question being put to him by counsel for the plaintiff, he answered: "Wholly so; I have had charge of the entire matter. It is absolutely so; there is nothing else in it." He says he "talked with Mr. Vadakin about bringing the suit; had him in mind for a day or two; thought he was a good man to bring the suit."

I can not reach the conclusion that Mr. Veach had any other interest at heart but that of the water company, and that he procured Mr. Vadakin to bring the suit solely to further the interest of the water company. He went with Mr. Vadakin to Flory's office. Mr. Vadakin had never before that visit consulted with Mr. Flory about the matter. There he found a motion, ready-prepared to serve on Mr. Smythe. He signed it,

1905-6.]

Vadakin v. Crilly et al.

and thus, at the request of Mr. Veach, set in motion forces which have caused all this trouble, and wrongfully prevented a sale of the bonds at public sale. The stream can not rise higher than its fountain, and is usually impregnated with the same elements where not far removed from its source.

But it is claimed that the case at bar is a different suit; and that is true; but is it not the same stream, a little further from the fountain or source?

It is quite apparent that the petition was prepared on the 20th of December, the next day after the meeting of the council, at which a resolution prepared at the instance of Mr. Veach was to be introduced, as he says, by Mr. Miller. Mr. Veach says he talked with Mr. Jones the next morning. Mr. Jones says he helped to prepare the petition on the forenoon of the 20th. The evidence does not show that up to this time Mr. Vadakin had been consulted. He is made plaintiff. Mr. Flory takes the petition up to his house. Mr. Vadakin said he would look over it and bring it down. Mr. Jones says that Mr. Vadakin never spoke to him about acting for him in the matter, but that on the day he set about to draft the petition, he thought Mr. Vadakin would be plaintiff. Whether he got that impression from the fact that he was plaintiff in the other suit, or from his talk with Mr. Veach on the morning of the 20th, or from other sources, does not appear.

It is claimed by the solicitor that the plaintiff has no standing in court for the reason that he was not given an opportunity to bring the suit. Section 1777 provides that the solicitor shall prosecute such actions. Section 1778 provides that if he fail to bring the suit, upon request of a tax-payer, that then it shall be lawful for such tax-payer to institute the proceedings.

On the morning of the 21st, the day the suit was brought, a request was served upon him to bring the suit. He claims that he did not refuse to bring the suit; that the person who served the notice told him that he would give him *just two minutes* to determine what he would do. He says the notice was served on him after eight o'clock in the morning, and that the petition was filed by the plaintiff within two hours. It is claimed by the plaintiff that the petition was not filed until afterwards, but the summons shows that it was received by the

sheriff at eleven o'clock A. M. An amended petition was filed, which might account for the discrepancy; but the plaintiff did not expect or desire that he should bring the suit, as the charge of bad faith is made in the other case.

Now, as to the charge of conspiracy and bad faith of the defendants:

This is charged, and both parties have gone into it. Reference is made to the pleadings and the evidence as to the entry which found its way upon the journal of the court, purporting to be the judgment of the court sustaining a demurrer to the petition, when the matter had never been called to the attention of the court, and the court had had no opportunity to pass upon the demurrer.

The court referred to this matter in its opinion in that case as an act most reprehensible in its character. No emergency, real or apparent, can justify such conduct on the part of the council. The haste with which the sale of the bonds was consummated, the manner of its consummation, and the price at which sold are referred to as suspicious circumstances; and the court is free to say that it does not understand why, in order to avoid any controversy, or ground of suspicion, the bonds were not re-advertised, or more deliberation used in effecting the private sale. And as to corrupt motive, it is not necessary to find and I do not find that there was such motive, but do not hesitate to announce that each represented a different, distinct and antagonistical interest and that each was putting forth his utmost endeavor to see that the interest be served, was successful in the contest and probably went further than good judgment and discretion would warrant or fairness approve.

It seemed to have been a race between the water company and the city officials, the one to prevent, the other to effect a sale of these bonds. I say "the water company," because I feel satisfied that it is the moving factor in the matter.

But, was there any conspiracy? If so, by what evidence is it made manifest? It is claimed that there was great haste. Well, everything in the matter at this time moved rapidly, excepting the serving of the first injunction; that was delayed longer than was for the welfare of the city and the tax-payer,

1905-6.]

Vadakin v. Crilly et al.

so that the court could not have an opportunity to pass upon it before the day of sale. If the parties entrusted with the sale had the legal right to sell at private sale, they were under no obligation to await the pleasure of any other person or persons. I myself think there was more haste than was demanded, or that was consistent with good judgment, but I have no right to say when a thing shall be done which the parties have the *right* to do in the present. Unless that haste resulted in damage to the city or was precipitated from a corrupt motive, no one has a right to complain.

Inadequacy of price paid for the bonds might be a badge of fraud or of lack of business capacity. It is claimed that the price claimed was greatly inadequate. Mr. Gaumender says that the sale was a reasonable one. Mr. Kennedy fixes the premium on such bonds at that time at 3.40 per \$100. This would be \$10,200. The amount paid was \$10,150, which would be just 3.38 1-3 on the \$100. I know that certain affidavits of agents for bond houses are presented, which state that they were worth much more; but this is easy to believe by an interested party. One of these affidavits, I believe, says his firm had a bid in for said bonds, but he is not able to say what the bid was. I doubt whether these bonds would not have brought a better price if this sale had not been made with such haste. There was, in my opinion, bad management, but mismanagement, without corrupt motive, is not ground for interference. How easy it would have been to have re-advertised or invited other bids? It will not do to say that they feared an injunction. That would be a reflection upon the courts.

I hold that this suit was not brought in the interest of the city, but in the interest of the water company; that the bonds had been properly advertised, and offered, as required by law, and that they remained unsold; that the officials had the right to sell them at private sale, under the statute; that there was no conspiracy to defraud the city in the sale; and the motion will be sustained and the injunction dissolved.

Jones & Jones and Flory & Flory, for plaintiff.

Phil. B. Smythe, A. A. Stasel, J. R. Fitzgibbon, Kibler & Kibler, Ford, Snyder & Henry, for defendants.

ADMISSION TO BAIL PENDING HEARING ON ERROR.

[Common Pleas Court of Lorain County.]

STATE OF OHIO v. D. W. BAKER.

Decided, December 2, 1905.

Criminal Law—Suspension of Execution of Sentence—Admission to Bail After Sentence—Common Pleas Court without Power to Grant—Sections 7321, 7325 and 7362.

The authority conferred upon a common pleas judge to suspend the execution of sentence of one convicted of a felony, for such period as will give a reasonable time to file a petition in error, does not authorize the admission to bail of the one so convicted, pending the hearing on the petition in error.

WASHBURN, J.

Application is made on behalf of the defendant, who has been found guilty by a jury and sentenced to a term in the penitentiary, for an order suspending the execution of his sentence, and admitting him to bail pending the hearing of his cause on error in the circuit court, which his counsel says will be begun within the next day or two, and it is urged in his behalf that the statutes of Ohio confer authority upon this court to make such an order, and to admit him to bail.

The prosecuting attorney admits that this court has authority to suspend execution of the sentence temporarily; but denies the authority of this court to admit the defendant to bail upon such temporary suspension.

Section 7321 reads as follows:

“When a person has been convicted of an offense, and gives notice to the court of his intention to file, or apply for leave to file, a petition in error, the court may on his application suspend execution of the sentence or judgment against him until the next term of the court, or for such period, not beyond the session, as will give him a reasonable time to apply for such leave.”

This is the only section that I know of which confers power upon the common pleas court to suspend the execution of its own

sentence in a case like the one being considered. And it seems apparent from the reading of the section, that the suspension provided for in this section, is merely a temporary suspension, for the purpose of affording the defendant a reasonable opportunity to file this petition in error in the circuit court, and to there secure a suspension of the execution of his sentence until that court disposes of his petition in error.

By Section 7362, authority is conferred upon the circuit court to suspend execution of the sentence in this case, upon the filing of the petition in error in that court.

The suspension of execution of sentence which this court is authorized to make under Section 7321 is only "until the next term of the court, or for such period, not beyond the session, as will give him a reasonable time to apply for such leave."

It was not intended by this section to confer authority upon this court to suspend the execution of sentence until the case could be disposed of in circuit court, for at this time no petition in error has been filed in the circuit court, and this court has no means of knowing when the circuit court will be likely to dispose of the case if a petition in error is filed in that court, and this court has no control as to time of hearing of the case in circuit court, if one should be filed.

It is reasonable to suppose that the Legislature intended that the court having authority over the case should have authority over the suspension of the execution of the sentence, and that authority, as I have said, is expressly conferred upon the circuit court by Section 7362, which reads as follows:

"Upon the filing of such petition in error in the Supreme Court, the execution of sentence shall, in cases of felony, be thereby suspended; and in cases of misdemeanor, the court or judge allowing the motion shall order such suspension. But no proceeding in error in any other court shall suspend execution of sentence, unless in capital cases, such suspension be for good cause shown, and on motion, and notice to the prosecuting attorney of the proper county, ordered by a majority of the judges of the circuit court of the county, and in other cases in such court by one judge thereof, and in cases in the common pleas court by one of the judges of such court."

Again, this court, under Section 7321, could not suspend execution of sentence until the case could be heard in the circuit court, for the reason that the circuit court is not now in session in this county and will not be in session again until several months after the expiration of the present term of this court.

I conclude, then, that this court has authority to suspend execution of sentence only temporarily; but the defendant does not desire such temporary suspension of sentence, unless this court has authority to admit him to bail during such temporary suspension.

Has the court such authority?

Section 7325, which was enacted at the same time that Section 7321 was passed, and which is a part of the same act, provides that—

“When a person is sentenced for a felony, and execution of sentence is suspended, the court shall order him into the custody of the sheriff, to be imprisoned until the case is disposed of.”

These two Sections 7321 and 7325 being a part of the same act, and being construed together, confer authority upon this court to grant a temporary suspension of execution of sentence, and in felony cases prohibits this court from admitting the defendant to bail upon such temporary suspension of execution of sentence.

But it is claimed by the defendant that authority is conferred upon this court to admit the defendant to bail upon such temporary suspension of execution of sentence, by the latter part of Section 7362, which reads as follows:

“In all cases of conviction for felony, except for murder in the first and second degree, where sentence has been or may hereafter be suspended, the judge who presided on the trial of the case may, in his discretion, admit the defendant to bail, conditioned that the defendant will prosecute his petition in error to effect and surrender himself to the custody of the proper officer of the county in which the conviction was had, in case such judgment against him be not reversed or a new trial ordered.”

1905-6.]

State v. Baker.

This quotation is a part of a section which provides for suspension of sentence on *petition in error*; but does not refer in any way to any other suspension of sentence.

It will be noticed that the bail provided for is conditioned "that the defendant will prosecute his *petition in error* to effect," etc., implying that a petition in error must be filed at the time of admitting to bail.

It is true that it uses this language: "In all cases of conviction for felony," etc., but what precedes this language in that section, and what follows it, appears to me to plainly require a construction of that section which confines its operation to a suspension of sentence upon petition in error.

If it was construed to apply to any other suspension of sentence, and to mean that this court could admit to bail upon temporary suspension, under favor of Section 7321, then it would be in direct contradiction of Section 7325, which provides "that upon a temporary suspension of execution of sentence the court shall order the defendant into the custody of the sheriff."

Such a construction of Section 7362 is a strained construction, and it does not seem to me that it was meant by that section to annul the provision in Section 7325, which requires the defendant to be confined in jail during the temporary suspension of sentence.

All of these sections being read and construed together mean simply this, that where a defendant has been tried in the common pleas court, found guilty of a felony, and sentenced by that court, then the court has authority, under Section 7321, to temporarily suspend the execution of sentence in order that the defendant may have time to begin his case in circuit court; but during such temporary suspension of sentence the defendant is required by Section 7325, to be confined in the jail of the county; then the defendant may secure, under Section 7362, a suspension of the execution of sentence in the circuit court, after filing his petition in error therein, until the circuit court can hear the case, and then after the circuit court has determined that there is such probability of error in the trial of the case as

warrants a suspension of execution of sentence, then the trial judge is given authority, under Section 7362, in his discretion, to admit the defendant to bail until the expiration of the suspension of sentence made by the circuit court.

Until the circuit court has suspended execution of sentence and fixed the time of such suspension, the common pleas court can not know how long to admit to bail even if it had authority to do so, and I think I ought not to take a bond conditioned "that the defendant will prosecute his petition in error to effect," before such petition in error has been filed.

In this case there is no necessity for a temporary suspension; that I would gladly grant; but the only object of suspension of sentence is to procure the release of the defendant on bail, and as I have no authority to admit to bail until the circuit court has suspended sentence, I must deny the motion of the defendant.

I am not doing so on the ground that admitting to bail at this time is discretionary with the court, but I am doing so solely on the ground that this court has no authority at this time to admit to bail.

Lee Stroup, Prosecuting attorney, and *George Chamberlain*, for the state.

W. B. Johnson, J. P. Dawley and Mr. Fisher, for defendant.

**INCONSISTENCY BETWEEN SPECIAL FINDINGS AND GENERAL
VERDICT.**

[Superior Court of Cincinnati, General Term.]

THE CITY OF CINCINNATI V. MARTIN FREY.

Decided, June 12, 1905.

*Negligence—On Part of a Municipality—In Permitting Sewage to
Back Up into Cellars—Answers of Jury to Special Interrogatories
—Inconsistent with General Verdict—Judgment Non Obstante
Veredicto.*

1. Every reasonable hypothesis will be indulged for the purpose of reconciling the answers to special interrogatories with the general verdict of the jury.
2. While provision for drainage of surface water by a municipality is a duty purely judicial in its nature, for the breach of which it has been held no liability attaches, the duty of keeping a sewer in proper condition is of a ministerial character, and where the sewer is inadequate to carry off the refuse and filth, which under certain conditions are backed onto the property of an abutting owner, the municipality is chargeable with the damages resulting.

HOFFHEIMER, J.; MURPHY, J., and HOSEA, J., concur.

The plaintiff in error was defendant below and the defendant in error was plaintiff below. The action was for damages from overflow of a sewer.

The petition substantially alleged that the plaintiff was the owner of a certain dwelling house in the city of Cincinnati. That the defendant, a municipal corporation, maintained a sewer under and along the street adjacent to plaintiff's property through which large quantities of waste and surface water from the streets and cellars is accustomed to find escape, and with which plaintiff's cellar communicates by drain. Plaintiff averred that the said sewer was inadequate to receive the waste and surface water which accumulated in that locality, and that said city failed and neglected to construct a proper sewer in said street; that during the years 1895, 1896, 1897, 1898, 1899 and up to the present time, during large rainfalls said sewer was negligently allowed to become filled with dirt and rubbish,

and the flow of water impeded and unable to pass off through said sewer by reason of its incapacity, and thereby filth and offensive refuse water and offal from various substances was sent back through plaintiff's said drain into his cellar, and during all said years said cellar has been, by reason of said water so sent back, flooded at times of rain, and kept damp and unhealthy at all times; whereby his enjoyment of said property has been diminished and the value lessened.

The answer of the city was a general denial, practically, and also set up the plea of the statute of limitations, as to certain years.

A general verdict was returned for the plaintiff below, and in connection with the general verdict the jury answered certain interrogatories, which were as follows:

Interrogatory No. 1 was propounded on behalf of the defendant.

"(1) Was the injury, if any, to plaintiff's property caused by the inadequacy of the sewer or catch-basin to carry off the surface water in case of heavy rains? Answer. Yes."

The plaintiff also submitted interrogatories to the jury, which were as follows:

"(2) Was the injury, if any, to the plaintiff's property caused by the inadequacy of the Sixth street sewer to carry off the sewage, refuse and filth contained therein in case of heavy rains? Answer. Yes.

"(3) In case of heavy rains during the four years prior to the bringing of this action was the plaintiff's premises flooded by back water and sewage previously discharged into said Sixth street sewer? Answer. Yes."

A motion for new trial was duly filed by the defendant below, assigning, among other causes, failure of the court to direct a verdict for defendant below at the conclusion of plaintiff's testimony. The motion was overruled.

Defendant below also filed a motion for judgment notwithstanding the general verdict, upon the answer of the jury to the special interrogatory propounded on behalf of the defendant. This motion was overruled. Judgment was entered on the ver-

1905-6.]

City of Cincinnati v. Frey.

dict, and plaintiff in error predicates error on the action of the court as referred to.

Plaintiff in error failed to take a bill of exceptions embodying all the evidence.

Although the petition in error assigns several grounds of error, two grounds only are relied on in argument. It is contended by plaintiff in error that if the injury for which the plaintiff in the court below recovered a verdict was caused by the insufficiency of the sewer to carry off the surface water in the case of heavy rains, the plaintiff can not recover (*Springfield v. Spence*, 39 Ohio St., 665). And that the answer to interrogatory 1 was inconsistent with the general verdict, and that, therefore, under Section 5202, Revised Statutes, the court below should have rendered judgment for defendant below notwithstanding the general verdict.

It is further contended by plaintiff in error that in considering the motion for a judgment, notwithstanding the verdict, on the ground that the answer to the special interrogatory is inconsistent with the general verdict, the court can only consider such interrogatory and its answer and the pleadings. Reliance for this proposition is had on *McCoy et al, Trustees, v. Jones*, 61 Ohio St., 119. A careful reading of that case, however, reveals that the motion referred to in that case, is the motion provided under Section 5328, Revised Statutes, which is as follows:

“When upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be rendered by the court although the verdict has been found against such party.”

Before the passage of the code a motion for judgment *non obstante veredicto* was purely a plaintiff's remedy (*Buckingham v. McCracken*, 2 Ohio St., 287). Since the adoption of the code however the substance of a motion *non obstante veredicto* and of a motion in arrest of judgment (a defendant's remedy) was carried into the code under Section 5328. *McCoy et al, Trustees, v. Jones* simply holds that in disposing of motions under that section the court should consider the “statements

in the pleadings" and that the record outside of the "statements in the pleadings" should not be considered by the court. In considering the motion filed by defendant below for judgment because of inconsistency in the interrogatories, the court was not bound to a consideration of the pleadings and the alleged inconsistent interrogatory only. Section 5202, Revised Statutes, provides:

"When the special finding of facts is inconsistent with the general verdict the former shall control the latter and the court may give judgment accordingly."

Now the Indiana code is precisely similar to our own, and our circuit court, after reviewing the Indiana authorities at some length, concludes that the general verdict must prevail if reconcilable with the answers to the special interrogatories upon *any state of facts provable under the issues in the case*. *Toledo Elec. St. Ry. Co. v. Bateman*, 16 C. C., 162.

In *Indiana & St. Louis R. R. Co. v. Stout*, Admr., 53 Ind., 143, it was said:

"Judgment will not be directed against a party in whose favor a general verdict has been rendered unless the antagonism of answers to special interrogatories is such that the special findings can not on any hypothesis be reconciled with the general verdict."

The court therefore must consider all the interrogatories and the answers thereto taken together, and they must be read as a whole, and any reasonable hypothesis will be indulged in in order to reconcile the answers to the special interrogatories with the general verdict. "Every reasonable presumption will be indulged in favor of the general verdict." *Lassiter v. Jackman*, 88 Ind., 118.

Reading these interrogatories and answers together and in view of the facts in the case, was there then, such glaring inconsistency as to warrant judgment for the city? Or was there any inconsistency?

The petition, which is substantially set out above, is somewhat loosely drawn, it is true, but nevertheless it states a legal cause of action sufficient to support a verdict. See *Dillon on Municipal*

1905-6.]

City of Cincinnati v. Frey.

Corporations, 4th Ed., Sections 1047, 1048 and 1049, and cases cited. The gist of the complaint was negligence in the city, *in permitting one of its sewers to become obstructed or to remain in such a condition as under conditions to cause a back flow of sewage* on to defendant in error's property.

Such a state of facts is to be distinguished from the facts in *Springfield v. Spence, supra*. In that case the court held that there was no liability for failure to provide drainage for surface water, for that was a failure to exercise a duty purely *judicial* in its nature. Under the state of facts here presented, however, there was a failure of ministerial duty on defendant's part to keep its sewer in proper condition. For the breach of such a duty there is a corresponding liability. See Dillon on Municipal Corporations, *supra*.

While it may seem that the special interrogatory propounded by defendant below (plaintiff in error), with its answer, is inconsistent with the general verdict, still, when this interrogatory and its answer is read in conjunction with the special Interrogatories propounded by plaintiff below, and the answers thereto, it will be apparent that there is no such antagonism and irreconcilable inconsistency between the special findings and the general verdict as to cause the former to control.

It is true the jury found in answer to the interrogatory of plaintiff in error, that the injury was caused by the insufficiency of the sewer to carry off surface water in the case of heavy rains, but, as it also found the injury was caused by the inadequacy of the Sixth street sewer to carry off sewage, refuse and filth contained therein, in case of heavy rains, and that during the four years prior to the institution of the suit plaintiff's property, in case of heavy rains, was flooded by back wash and sewage previously discharged in the city sewer, it seems clear to us that such findings support the contention of defendant in error, viz., that the city was negligent in suffering a condition to exist, which caused back flow of sewage and filth on the property of defendant in error. In other words, both the general verdict and the interrogatories seem to us in every sense consistent and responsive to the charge of negligence averred in the petition.

The mere fact that the sewer *in addition* to its being inadequate to carry off the refuse and filth, which refuse and filth under certain conditions backed onto the property of defendant in error, was also of insufficient capacity to carry off the surface water in case of heavy rains, did not *render defendant's liability any less*.

In view of the foregoing we are of the opinion that the answers to the interrogatories read as a whole, indicate that the jury clearly intended to find and did find the city guilty of negligence in suffering a state of facts, whereby a sewer used for carrying off sewage was so maintained that at times the sewage backed onto the property of defendant in error.

We find no inconsistency between the answers to the interrogatories and the general verdict. This being so, we conclude that the court below did not err in overruling the motion for judgment filed by the city.

We are likewise of opinion that the motion for new trial was properly overruled.

Finding no other error prejudicial to plaintiff in error, the judgment below will be affirmed with costs.

Albert H. Morrill, Assistant City Solicitor, for plaintiff in error.

John C. Healy, for defendant in error.

1905-6.]

Cincinnati Traction Co v. Baron et al.

PASSENGER ON STREET CAR INJURED IN COLLISION.

[Superior Court of Cincinnati, General Term.]

**THE CINCINNATI TRACTION COMPANY V. JOHN BARON AND C.
CRANE & COMPANY.**

Decided, January, 1906.

*Negligence—Injury to Passenger on Traction Car—Extent of Injuries—
Pleading—Intoxication of Motorman—Charge of Court—Highest
Degree of Care—Dismissal of Co-defendant.*

1. In an action for damages on account of injury to a street car passenger in collision with a wagon, an averment in the petition that the motorman negligently, carelessly and unskillfully permitted his car to run into the wagon, is sufficiently broad to make competent testimony to the effect that the motorman was in a state of intoxication five hours before the accident occurred.
2. While instructions to the jury on abstract propositions of law is open to technical objection, such instruction is not necessarily prejudicial, and was not prejudicial in this case.
3. What the court said to the jury in this case as to "highest degree of care" is not open to criticism, inasmuch as to have said anything less would have made what was said merely an instruction on ordinary care; and it can not be said that repetition of the degree of care required was erroneous as the repetition of the substance of this portion of the charge can not be said to have been clearly unnecessary, or made for the purpose of emphasis or to influence the decision of the jury.
4. Where testimony tends to show that there was some pecuniary injury to the plaintiff from loss of time and diminished earning capacity, it is not improper to instruct the jury upon that subject.
5. Where in such a case the company owning the wagon is made a party defendant, the granting of a motion to dismiss this party from the case is not a matter of which the traction company can complain inasmuch as the liability of the defendants, if any, was separate as well as joint.

HOFFHEIMER, J.; HOSEA, J., and LITTLEFORD, J., concur.

This was a proceeding in error. The action below was for personal injuries, and was brought by John Baron against the plaintiff in error and C. Crane & Co. Plaintiff on the day of the alleged injury was a passenger on one of the cars of the

plaintiff in error, and while the car in which he was seated was proceeding east on Eastern avenue in the city of Cincinnati, a car struck one of the wagons of C. Crane & Co., throwing the plaintiff violently to the floor, by reason of which he claims to have suffered injuries. General denials were filed by both defendants. At the close of plaintiff's testimony defendant, C. Crane & Company, moved to be dismissed. Motion was granted over the objection and exception of plaintiff in error. The cause proceeded against plaintiff in error, and resulted in a verdict for \$1,500. Judgment was in due course pronounced on said verdict, and a reversal of the same is now sought.

There are several assignments of error. It is claimed that there was no evidence to show negligence on the part of plaintiff in error; that there was no evidence to show that plaintiff below was injured as claimed; that there was error in admitting certain testimony as to the intoxication of the motorman at noon on the day of the accident; that there was error in giving and refusing certain special charges and error in the general charge.

With regard to the errors first mentioned, as there was testimony tending to show a breach of duty on defendant's part, and also that the injury was occasioned in the manner claimed, thus warranting the action of the jury, the verdict can not be disturbed.

Nor do we think there was error in admitting testimony as to the intoxication of the motorman. The witness was permitted to testify that the motorman was in a state of intoxication about noon on the day of the accident. The accident, it seems, occurred about five o'clock of the same day. It is claimed that this testimony was incompetent because there is no allegation in the petition of general incompetency of the motorman, to the knowledge of the defendant company; also that the testimony was too remote. The charge in the petition, it will be noted, is, that the motorman negligently, carelessly and unskillfully permitted his car to run into the wagon. This averment is sufficiently broad to make the testimony as to the physical condition of the motorman before and at the time of the accident relevant, and this is especially so if it is sought to show that his physical condition was affected by his own wrongful act. Sup-

1905-6.]

Cincinnati Traction Co. v. Baron et al.

pose plaintiff below had attempted to show that the motorman's lack of care grew out of the fact that he was a drinking man and that the lack of care was attributable to the effects of drink. Such were the facts in *Ryne v. Railway Company*, 19 N. Y. Supp., 218, 219, and it was said:

"The fact that the driver drank at the liquor store just before starting out on the trip, was admissible as bearing on the driver's condition at the time of the accident. The effects of drinking are not so transitory as to make such testimony irrelevant."

Intoxication influences a peculiar condition of the body and faculties (Wigmore on Evidence) and where intoxication is shown a short time before an alleged negligent act complained of, the evidence becomes admissible, because it may have a tendency to prove a lack of care. In *Wright, Administrator, v. The City of Crawfordsville*, it was said:

"A portion of this evidence went to show that the decedent only a few hours before this accident was intoxicated. This was proper as tending to prove that the deceased was intoxicated when he drove into the ditch, and therefore did not exercise due care." *Wright v. The City of Crawfordsville*, 142 Ind., 636, 642, 643; *Rhyner v. The City of Menasha*, 107 Wis., 206, 209; Wigmore on Evidence, Section 85, and cases cited.

The petition alleges that the traction company operated and ran its cars at an extremely high rate of speed along Eastern avenue, and that the motorman in charge of said car did not attempt to avoid running into said wagon, or to slacken the speed of said car, but negligently, carelessly and unskillfully permitted said car to continue at a high rate of speed until it struck the wagon. Such being the negligence complained of, it is claimed that the court below erred in its general charge, where it said—

"It was the duty of the defendant to have placed in charge of its car a person skilled in the knowledge and rules appertaining to the safe operation of the car."

Also the following—

"And while the law does not require any particular form of equipment or any particular appliances for the regulation of

speed of its cars, or for checking their movement, it does require safe appliances and proper skill in the person operating the car, so as to perform their particular functions."

The claim is that these instructions injected into the case two distinct issues not warranted by the pleadings; an issue as to general incompetency of the motorman, and another, as to the character of the appliances. This is claimed to be error on authority of *Traction Company v. Forest*, 73 O. S. But in that case, however, the issue of contributory negligence was wrongfully injected into the case, and the Supreme Court was of the opinion because of instructions upon contributory negligence, that the jury may have implied or inferred that the traction company was negligent. In the case at bar, while it may not be technically accurate for the court in its general charge to announce the rules complained of, yet it is apparent that they were merely stated in a general way, as illustrative of correct principles, and as there was no evidence with respect to said charges, we do not think the jury could have been misled, and that the instructions amounted simply to instructions on an abstract proposition of law. This has been held not prejudicial error. *P., C., & St. L. Ry. Co. v. Bemis*, 1 N. P.—N. S., 112, affirmed without report, 71 O. S., 539. See also *Cressinger v. Welch*, 15 Ohio, 156, 190; *Albatross v. Wayne*, 16 Ohio, 513; *Creed v. Commercial Bank*, 11 Ohio, 489; *Schneider v. Hosier*, 21 O. S., 98, 113; *Railway Co. v. Hastings*, 136 Ill., 251.

In the latter case it was held:

"The giving of an instruction containing a correct proposition of law not predicated upon evidence introduced in the trial, will not, as a general rule, be such error as to call for a reversal; such an instruction ought not to reverse unless it appears from the record that the party was in some manner prejudiced by it."

As already stated, the evidence adduced at the trial was wholly in support of the particular acts of negligence specifically and particularly averred in the petition. After reading the record, we can not see how the jury could possibly have

1905-6.]

Cincinnati Traction Co v. Baron et al.

been misled or suffered any prejudice, because the court in its general charge adverted to the general rules above pointed out. For the same reasons, we think that the giving of Special Charge No. 2 in the record, which was a definition of the highest degree of care, was not erroneous.

It is claimed, also, that the court in its charge failed to properly define the degree of care exacted of defendant below, inasmuch as it failed to limit the "highest degree of care" to "such care as is consistent with the practical operation of the road." And it is also claimed that the court erred to the prejudice of plaintiff in error, because in its general charge it several times repeated that part of the charge wherein the "highest degree of care" was referred to. In 8 O. S., 570, 584, the Supreme Court said:

"We have had occasion to remark that the bill of exceptions is to receive a reasonable and not a hypercritical construction, that the series of instructions should be taken together."

And it also seems that the charge must be construed as a whole. See *Railway v. Widdon*, 2 C. C.—N. S., 544; *Rupp v. Shaffer*, 21 C. C., 643; *Ohio & Indiana Torpedo Co. v. Fishburn*, 61 O. S., 608; *Monroeville v. Wehl*, 13 C. C., 689.

Reading the instructions together, and the charge as a whole, we think the jury was fairly instructed as to the degree of care exacted of the defendant, traction company. While the degree of care to be exercised was not limited precisely in the manner claimed by plaintiff in error, a glance at the charge will show that the court did endeavor to qualify its definition of the "highest degree of care," so as to distinctly impress upon the jury that the traction company was in no sense the insurer of the safety or of the life of the passenger. Special charge No. 1 was as follows:

"Said railways are public carriers. It is their duty as common carriers of passengers, to use the highest degree of care to the passengers. They must use the utmost care that they *can* use under the circumstances, and in view of the character of the mode of conveyance adopted, *reasonably* to guard against accidents and consequent injuries, and if they neglect to do so, they are to be held strictly responsible for all consequences which flow from such neglect."

In the general charge the court says:

“And it was in this connection the duty of the traction company not to expose the plaintiff to any hazard, that *reasonable* care and diligence could have avoided. The standard of care required of both parties is that of a prudent man, and the jury may ask the question in the consideration and determining of matters of responsibility, what ought a prudent man to have done under the same or similar circumstances.”

As already stated in another part of the court's charge it said that the company was not the insurer, and here we find the court saying that although the carriers must use the utmost care, it is the utmost care under the circumstances in view of the mode of conveyance adopted, to *reasonably* guard against accidents.

There is objection also because the court failed to qualify the word “prudent” by the word “ordinarily.” This was not erroneous (see *Railway v. Murray*, 53 O. S., 570). It is also claimed that inasmuch as the court used the words “a prudent man” that the jury could have selected for their standard the most prudent man in the world. We hardly think that this is a fair criticism. The court was speaking of the care required of carriers generally, and it is hardly possible the jury could have thought that the reasonable care spoken of, referred to the most prudent carrier in the world. Without being hypercritical, but placing a reasonable construction upon the charge as we are required to do, we think the general and special charge fairly defined the “highest degree of care” required of the defendant below. Anything less would practically amount to an instruction on ordinary care.

As to the claim that the court erred because it repeated that part of the charge referring to the degree of care exacted, we can not say that the repetition was clearly unnecessary, or that it was made by way of emphasis, or for the purpose of influencing the jury's decision, consequently the claim that the repetition was erroneous is not tenable. See *Railway Co. v. Moreland*, 12 O. C. D., 612, Syl. 5.

Certain special charges were requested by plaintiff in error with reference to the measure of damages. These were refused

by the court, and the substance of the same correctly given in the general charge.

But the plaintiff in error claims that there was no testimony in the case to show that the plaintiff lost any time as a result of the accident, or that his earning capacity was diminished in the slightest degree. In other words, he claims that there was a total failure of proof in this regard, and instead of permitting the jury to speculate upon this question, upon which it is claimed there was no evidence, it was the duty of the court to instruct the jury that there could be no recovery on account of these elements. In the court's general charge, he distinctly says, referring to loss of time and diminished earning capacity:

"Unless loss be shown by the testimony, no recovery could, as under this item, be found by the jury."

If, then, the jury concluded that there was no loss in that regard, they could have rendered no damages on that account. We are of the opinion, however, that the record does tend to show that there was some pecuniary injury on account of loss of time and diminished earning capacity. At page 5 of the record, plaintiff below testified that the next day after the accident, the injury commenced getting worse and he had to go home from his work. At pages 8, 9, 10, 13 and 45 he testifies that proper attention to his business compelled him to help unload material, do a great deal of walking, and help at work on the pile driver. At pages 9, 11 and 15 he says that on account of the injury, he was obliged to give up his business of contracting for a period of nearly two years. In *Watson on Damages for Personal Injury*, Section 503, it is said:

"It is not necessary to establish definite pecuniary value of this earning capacity, or to prove the extent of the actual pecuniary loss. It is believed only requisite to make it appear that plaintiff was in possession of powers and faculties available for money earning purposes, and the extent to which these powers and faculties have been destroyed or impaired." See also *Fisher v. Jansen*, 128 Ills., 549.

In *Voorhiss on Damages*, pages 54, 55, it is said:

"Where the plaintiff is engaged in a business, and the time lost from it can not be well ascertained by reason of the non-

existence of any rule to measure it, the jury, from all the facts before them, may in their discretion award him an amount sufficient for a reasonable compensation for time so lost." See also *Watson on Damages*, Section 514, and *Railway v. Vance*, 41 S. W. Reporter, 167.

It is also claimed that the court erred in refusing to give for defendant below the following special charge:

"If you find the plaintiff did not receive the injuries complained of as a result of the accident in question, then I charge you, your verdict must be for defendant, even though you find that plaintiff was injured."

On reading the court's general charge, however, we find that this charge was substantially given at page 301 of the record, where the court states:

"Or, reaching the conclusion that the injury complained of was not the result of the negligent conduct of the defendant company * * * it would be your duty to find for the defendant, Cincinnati Traction Co."

Finally, was there error prejudicial to plaintiff in error, as to the dismissal of co-defendant, C. Crane & Company? At the conclusion of plaintiff's testimony, co-defendant, C. Crane & Company, moved to be dismissed. The motion was granted. It is unnecessary to decide whether that motion was correctly granted, as the plaintiff below does not complain. The liability, if any, of these defendants, was separate as well as joint, and plaintiff in error can not complain of the action of the court below, since its rights were in no way affected. *Wallace, Admx., v. Railroad Company*, 36 App. Div. (N. Y.), 57.

For the reasons above given, we are of opinion that there was no error prejudicial to plaintiff in error, and the judgment is accordingly affirmed, with costs, and it is so ordered.

G. H. Warrington and *T. B. Parton, Jr.*, for plaintiff in error.

F. L. Hoffman, for defendant in error.

O'Hara & Jordan, for C. Crane & Co.

1905-6.]

In re Avery C. Lowe.

COMMITMENT OF CONTUMACIOUS WITNESS.

[Common Pleas Court of Franklin County.]

IN THE MATTER OF THE APPLICATION OF AVERY C. LOWE FOR
A WRIT OF HABEAS CORPUS.

Decided, October 24, 1905.

*Witness—Right of, to Refuse to Testify—Where the Disclosure Would
Tend to Incriminate—Witness the Sole Judge—Burden on Sheriff
to Show Legality of Commitment—Liability of Witness to Suit for
Damages—Habeas Corpus.*

1. The rule in Ohio that a witness, refusing to answer on the ground that the disclosure will incriminate him, is himself the sole judge as to whether such is the fact, is subject only to the further rule that the party aggrieved may prove, if he can, in an action for damages, that the reason given was false and the refusal to testify willful.
2. Where a witness who has refused to answer, on the ground that he might thereby incriminate himself, is committed as contumacious, the burden is upon the sheriff to show that the commitment was legal.
3. Inasmuch as there are crimes in which proof of agency is necessary to conviction, a court will not hold that a witness has been legally committed for contempt in refusing to answer a question as to whether he was the agent of a certain bridge company during a certain period, where there is nothing in the record showing the nature of the action in which the witness is being examined.

BIGGER, J.

Plaintiff in his petition represents that he is unlawfully restrained of his liberty by George J. Karb, Sheriff of Franklin County, Ohio, and he attaches to his petition a copy of the commitment and cause of detention. He avers that the restraint is without legal authority and contrary to law, in that the petitioner is not guilty of any offense against the laws of the United States or the state of Ohio, authorizing or justifying such restraint, and that the notary making the commitment was without authority of law to make the same. The writ having issued, the sheriff makes the following returns:

"Court of Common Pleas, Franklin County, Ohio. *In re Avery C. Lowe, ex parte, Habeas Corpus, No. 5086.* George J. Karb now comes and states that he is the duly elected and qualified sheriff of Franklin County, Ohio, and produces the body of Avery C. Lowe, in obedience to a writ of habeas corpus heretofore attached, and states that on the 16th day of October, 1905, as said sheriff he took into his custody said Avery C. Lowe in obedience to a certain order of commitment that they received by him, a copy of which, marked Exhibit A, is hereto attached and made a part hereof; and then when said writ of habeas corpus was served upon him, he held said Avery C. Lowe in obedience to said order of commitment. George J. Karb, Sheriff, Franklin County, Ohio."

Exhibit A, attached to the return, is as follows:

"*To George J. Karb, Sheriff of Franklin County:*

"Whereas, on the 12th day of October, 1905, in a certain action then and still pending in the Common Pleas Court of Sandusky County, in said state, wherein the State of Ohio, ex rel Cora F. Briggs, etc., is plaintiff, and Henry Hughes et al, are defendants the undersigned George W. Bope, a notary public in and for Franklin county, Ohio, in said state, at his office in the city of Columbus, in said county and state, at the request of said plaintiff and on his behalf was taking the depositions of witnesses in said action, and A. C. Lowe, a resident of said county of Franklin then and there appeared as a witness in behalf of said plaintiff and was sworn and examined, and upon his said examination as a witness and while his deposition was then and there being taken, and for the purpose of making answer to the same a part of said deposition, the following question was put to him by H. C. DeRan, counsel for said plaintiff, to-wit: 'Were you representing any bridge company which was doing business in any county in the state of Ohio, during the period from January 1st, '98, to January 1st, 1901?' And the said A. C. Lowe then and there refused to answer the said question last mentioned on the ground that the answer thereto might tend to incriminate him; and thereupon the undersigned ordered the said A. C. Lowe to answer said question, which he again refused to do for the same reason, and the undersigned then and there for the said contempt of said A. C. Lowe in so refusing to answer said question, ordered and adjudged that he be imprisoned in the county jail of said county of Franklin until he submits to testify in the premises. You are therefore ordered to arrest and commit the body of said A. C. Lowe to the jail

1905-6].

In re Avery C. Lowe.

of said county of Franklin, there to remain until he shall submit to testify as aforesaid, and of this order make lawful service and due return.

"Given under my hand and official seal this 11th day of October, 1905.

"GEORGE W. BOPE,
"Notary Public in and for Franklin County, Ohio."

To this return of the sheriff the petitioner demurs. The first business in any county in the state of Ohio, during the period privilege of the witness to refuse to answer any question put to him on the ground that the same may tend to incriminate him. It was a favorite maxim of the common law that *nemo tenetur seipsum accusare*. This rule that no man should be required to incriminate himself had its origin in the common law in the popular practices against the inquisitorial methods employed in many countries to extort confessions from those suspected of crime. This principle which was but a rule of evidence in England, took the higher form in this country of a constitutional guaranty alongside the writ of habeas corpus, the right to jury trial, freedom from unreasonable searches and seizures and constitutional guaranties for the protection of personal rights and liberties to the people. While there is some apparent conflict of authority as to the extent of this privilege and the circumstances under which it may be invoked, I think the question in this state has not any uncertainty, but must be regarded as settled by the decision in *Warner v. Lucas*, 10th Ohio, 336. The syllabus is:

"The witness is not bound to answer any question that will directly or indirectly criminate himself, although in such case the witness is his own judge, yet he is liable to an action by the party if his refusal to testify be willful and his excuse false."

That was an action brought by one who claims to have been injured by his refusal to testify—an action for damages. It was sought to prove what the questions were which were propounded to the witness and which he refused to answer, and also to prove that any answer which he might have made could not possibly tend to incriminate him. This the trial court refused to

allow on the ground that the witness was the sole judge as to whether or not his answers would incriminate him. And this the court held to be the true ruling in so far as the witness was concerned, but that another rule was to be applied in an action brought to recover damages for an injury suffered by reason of his false and willful refusal to testify; that while it might be extremely difficult to prove that the answers which he might make would not tend to incriminate him, yet that, if that could be proven, it in no way conflicted with the full recognition and preservation of the privileges of the witness to refuse to give any testimony which might tend to incriminate himself.

That this is the rule in Ohio seems to be recognized by all the text-writers. Indeed, to me this seems to be the only practical rule. If the privilege of the witness is to be of any real value to him, how can a magistrate or court determine whether the answer will or will not tend to incriminate him, if the knowledge of the crime be located in the breast of the witness, unless in some way and by some means knowledge is obtained of the nature of the crime, the disclosure of which the prisoner seeks to avoid. The rule, according to all authorities, extends not merely to the right to refuse to answer the question, the answer to which will alone be sufficient to disclose his knowledge, but extends as well to answers which may furnish a link in the chain of evidence to convict him of a crime of which the court knows nothing.

In this particular case there is nothing whatever before the court by which any judgment can be formed upon the question as to whether or not an answer to this question might tend to incriminate the witness. The burden is not upon the petitioner but upon the sheriff to show that the prisoner is lawfully detained, and puts upon him the burden of showing that he was lawfully committed, as a contumacious witness, and unless it appears in some way upon the record that his refusal was contumacious, then he was not in contempt and could not be lawfully imprisoned for his refusal to answer. There is nothing in the record which discloses the nature of this action in which he was being examined as a witness, and upon the demurrer

1905-6.]

In re Avery C. Lowe.

the court is, of course, confined to the record. He was called upon to disclose the fact as to whether or not he was acting as an agent for any bridge company during a certain period. There are crimes in which the proof of agency is essential to a conviction, and for aught that appears the answer to this question might furnish material evidence against the witness in a prosecution for crime. These considerations are sufficient to dispose of the case without discussing the other objections which are made to the sufficiency of this return.

If it be said this rule has a dangerous latitude, the answer is pointed out by our own Supreme Court in the case of *Warner v. Lucas* thus:

“There is certainly but little danger that witnesses will refuse to answer questions under oath upon the ground that their answer might incriminate them, unless such be the fact. Besides exposing themselves to liability in a civil action, the effect upon their own reputations of claiming the privilege is so disastrous that but little danger is to be apprehended from the parties of their privilege. Men who have not committed a crime will seldom state under oath that they are afraid to answer questions for fear it will expose them to criminal prosecution.”

The rule laid down in the case of *Warner v. Lucas* has not been reversed or modified by our Supreme Court, and must be regarded as the rule in such cases in this state. For this reason the finding is that the return of the sheriff does not state facts sufficient to show that the petitioner is lawfully restrained of his liberty, and the demurrer thereto is sustained. I will make the same ruling in the other case.

T. J. Keating, for Lowe.

F. S. Monnett, contra.

allow on the ground that the w
to whether or not his answers
the court held to be the tri
concerned, but that anot
brought to recover da
of his false and will
be extremely diffic
make would not
be proven, it i
preservation
any testin

That

text-w
rule
to

INSURANCE POLICIES.

[Cincinnati, General Term.]

EDWIN BESUDEN ET AL.*

December 24, 1903.

Insurance Assignable by a Married Woman—Under

the First Clause of Section 3629, for the reason that this

clause has relation to a married woman simply, and without any

qualifying words expressing the assignor's intention, and operates

to fix upon such assignment a presumptive intention to make

provision for a married woman and her children jointly.

2. But an assignment to a wife and her assigns, with a reversion

back to her husband in case of her prior death, creates an estate

solely for her use, and is valid under the second clause or excep-

tion of the statute.

HOSKA, J.; SMITH, J., and FERRIS, J., concur.

This cause comes up on reservation from the court below, being a suit in foreclosure upon a policy of insurance assigned by Mr. and Mrs. Besuden to plaintiff as collateral security to certain notes. The material facts are as follows:

In May, 1889, Edwin Besuden, then unmarried, took an endowment policy in the Provident Life & Trust Company of Philadelphia, in the amount of \$15,000, payable May 29, 1921, or in case of prior death to his executors, administrators or assigns. Besuden subsequently married, and on July 28, 1890, executed to his wife assignment as follows:

"Assignment conditional upon the survival of the assignee.—For value received, I hereby transfer, assign, and set over unto Annette R. Besuden and my assigns all my right, title, and

*Affirmed by the Supreme Court without report, December 19, 1905 (73 Ohio State).

Reakirt v. Besuden et al.

policy of insurance issued by the Provident Life
any of Philadelphia, No. 38609, dated May 29,
advantages to be derived therefrom, provided
nee should survive me; otherwise all right, title
st in the said policy is to revert to me as fully as if
ignment had never been made.
Witness my hand and seal this 28th day of July, 1890.

“EDWIN BESUDEN.

“Sealed and delivered in presence of:

“WM. D. YERGER,

“S. P. ELLIS.”

The assignment, as appears, was duly recorded with the
company on July 30, 1890.

It is admitted by counsel for both parties that the words
“my assigns” in this document, is a clerical error, and
should be read “her assigns,” so that no contention is made
on this point.

On September 29, 1894, Besuden purchased the entire interest
of L. B. Reakirt in the E. Besuden Co., paying cash \$2,000
and giving notes for balance of \$4,000, at one and two years,
and, to secure these notes, pledged certain stock shares in the
Clark Carriage Company, and together with his wife executed
an assignment of the above mentioned insurance policy to
Reakirt also as collateral security.

In 1896, '97, '98, '99, 1900 and 1901, Besuden failing to
pay the premiums on the policy, Reakirt, to keep the policy
alive, paid the annual premiums of \$391.95 each, and in 1900
Besuden repaid to Reakirt \$625 of the amount so advanced.

The plaintiff in his petition filed in September, 1900, asks
that an account be taken of the amount due him upon the
notes, and for the premiums advanced by him, with interest,
and that upon failure of Besuden to pay said amount, within
a time to be designated, the policy be sold under the court's
discretion, and his debt paid from the proceeds.

The defendants contend:

- (1). That the assignment by Mrs. Besuden to Reakirt of the
insurance policy is void under Section 3629, Revised Statutes.
- (2). That Reakirt is not entitled to recover back the

premiums paid by him, because there was no contract with Mrs. Besuden respecting them.

(3). That by reason of the extension by Reakirt of one of the notes, the policy was to that extent at least released as security.

Waiving all questions arising from the fact that the assignment is merely of a contingent interest in an endowment policy, and assuming the policy to be of the general character contemplated by the statute, Section 3629, the vital question as presented, is whether the wife took an assignable interest.

The material parts of Section 3629, applicable to the case are as follows:

(a). "A policy of insurance on the life of any person duly assigned, transferred, or made payable to any married woman, * * * whether such transfer is made by her husband or other person, shall inure to her separate use and benefit and that of her children independently of her husband or his creditors," etc.

Then follows an exception, namely:

(b). "and if by its terms, or a transfer thereof, a policy is payable to a married woman solely for her use, she may sell, assign, or surrender the same, but the party whose life is insured shall concur in and become a party to the transfer."

It is claimed by the husband and wife, as against the foreclosure, that, by virtue of the clause first quoted, the assignment of the policy to the wife inured to her and her children jointly, and that her re-assignment to Reakirt was void; and that no authority can be derived by her under the second clause quoted, for the same reason.

In considering the proper construction to be given the statute in question, it should be premised, that, so far as it introduces any limitations, it engrafts them upon that general freedom of contract which it is the policy of the law to uphold. But, as pointed out by our Supreme Court in *Ryan v. Rothweiler*, 50 O. S., 602, the original statute of 1847, and certain of its amendments, constituting together the present Section 3629, were merely declaratory of conditions and limitations already

1905-6.]

Reakirt v. Besuden et al.

existing. "The statutes were passed," says the court, "as is often done, to express, define, limit, and make certain, a power which already existed."

So far as the solution of the question here turns upon mere phraseology it will be observed that the words "shall inure to the separate use and benefit of the wife and that of her children," are substantially defined by what follows, namely: "independently of her husband or his creditors," etc.; that is, where a policy is made payable to a married woman, it shall so inure.

But in the exception clause, the words, "solely for her use," are in like manner defined by following words, namely: "she may sell, assign or surrender," etc.; that is, if the assignment, or the policy itself, shows that the policy is given her solely for her use, then she takes an assignable estate.

This second clause of the statute seems to be inserted merely to make clear and certain the meaning of that first quoted, that is to say: said first clause has relation to an assignment to a married woman, simply, and without any qualifying words expressing the assignor's intention, and operates to fix upon such assignment a presumptive intention to make provisions for a married woman and her children jointly, and therefore the policy is not assignable by her.

The dispute then narrows itself to this, namely: Whether the assignment in question falls within the first named clause or the exception which follows. The assignment is to the wife and assigns; and also contemplates a reversion back to the husband in case of the wife's prior death. The assignment manifestly, as it seems to us, falls within the exception, for the reason that the test of an estate "solely for the use" of the wife, is, by the terms of the statute, its assignability; and this quality is given by the use of the words "and her assigns" in the instrument of transfer—these words having a fixed legal meaning and effect elementary in the law of conveyancing. The estate conveyed therefore is by direct terms made assignable, where, under the statute, this result would be deduced from any phraseology indicating an intention to give the wife an

estate solely for her use. In other words, assignability being the quality of estate intended by the statute in the description "solely for her use," the expressions are practically synonymous; so that words creating assignability of estate must be held as bringing the case within the exception intended by statute.

This construction seems the more reasonable in view of the obliteration of the distinction between separate and general estates of married women by our modern statute, Section 3114, placing married women on an independent basis in respect of property rights.

As to the claim of release of surety by extension of one of the notes, it is sufficient to note that the burden is upon the surety to prove that the extension was granted upon a definite agreement based upon a sufficient consideration. The record before us does not meet this demand of proof. *Osborn v. Low*, 40 O. S., 347 (351).

The contention as to the right of a pledgee to look to the pledge for reimbursement of sums paid to keep the security alive, rests affirmatively upon doctrines so well established that we do not deem it necessary to review the authorities. The case falls within the familiar principle that a mortgagee in possession is entitled to his expenses rendered necessary to preserve the property because such outlays are equally for the benefit of the mortgagor. The rule is held to apply equally to securities such as that involved in the case at bar. *Leslie v. French*, L. R., 23 Ch. Div., 552.

Judgment for plaintiff.

SMITH, J.

I concur in the results reached by the majority of the court in this case; but I reach the conclusion that the assignment was effective by a different method of reasoning.

The main question in this case is: Was the instrument of transfer signed by Edwin Besuden and Annette R. Besuden sufficient to convey the policy to Llewellyn B. Reakirt as collateral security for his debt?

1905-6.]

Reakirt v. Besuden et al.

The transfer from Edwin Besuden to Annette R. Besuden is as follows:

"For value received I hereby transfer, assign and set over unto Annette R. Besuden and assigns all my right, title and interest in policy of insurance issued by the Provident Life & Trust Company of Philadelphia, No. 38609, dated May 29, 1889, and all advantages to be derived therefrom, provided said assignee should survive me; otherwise all right, title and interest in the said policy is to revert to me as fully as if this assignment had never been made."

The contention that the assignment by Edwin Besuden and Annette R. Besuden to Reakirt was not effective is based upon the claim that the transfer by Edwin Besuden to Annette R. Besuden was not "solely for her use" as provided in Section 3629; that her children therefore acquired an interest in the policy and therefore the assignment of the policy was not good without the consent of the children.

Section 3629 in one clause declares that—

"A policy of insurance on the life of any person duly assigned, transferred or made payable to any married woman or to any person in trust for her or for her benefit, whether such transfer is made by her husband or other person shall inure to her separate use and benefit, and that of her children independently of her husband or his creditors or of the person effecting or transferring the same or his creditors;"

And in the latter part of the same section it is declared that—

* * * "and if by its terms, or a transfer thereof, a policy is payable to a married woman solely for her use she may sell, assign or surrender the same, but the party whose life is insured shall concur in and become a party to the transfer."

It seems to me that this statute has no application to the case at bar for the reason that both provisions of the statute above referred to have reference only to a case where a policy of insurance is transferred absolutely to a married woman. In such a case the transfer inures to the benefit of her children, and she can not assign it without their consent unless in the language of the statute it is transferred to her "solely for her use."

In *Sticken v. Schmidt*, 64 O. S., 354, 359, the policy of insurance was on the life of the husband and the policy was

payable to his wife, Louisa Keck, or in the event of her death prior to that of the assured, to his surviving children, share and share alike, or in the event of no children surviving, then to the legal representatives of the insured.

The policy in *Sticken v. Schmidt* differed from the policy in the case at bar before the assignment to Reakirt in only one respect. It provided in a certain contingency that it should go to the children, whereas this policy with the transfer contains no such provision; but in both policies the wife was to get the benefit of the policy only in the event of her surviving her husband.

It was held in *Sticken v. Schmidt* that Section 3629 did not apply to such a policy. The court said:

“Both provisions (of the statute), it will be noticed, are applicable only to policies in which the wife is the sole beneficiary named, and which are issued for her sole use. The defendant’s policy was not of that nature and not within the purview of the statute. By its terms the children and personal representatives of the insured were made beneficiaries and had an interest of the same general nature as that of the defendant though more remote. The interest of each depended on the contingency of survivorship; and it seems evident that she could not by a sale of the policy without the consent of the other beneficiaries any more than could they by sale without her consent confer any title on the purchaser; nor could either without the concurrence of all surrender the policy, or accept a paid-up one in its stead.”

If the words “the children” are omitted from the above citation, it is applicable exactly as it is written to the policy in the case at bar; and it therefore follows that Section 3629 is not applicable to such a policy, and since the only beneficiaries were the husband and wife and both had joined in the transfer of the policy, the transfer has been made by all persons having an interest in it, and the transfer is effective.

Sayler & Sayler, for plaintiff.

Wright & Wright, for defendant.

1905-6.]

Linghler v. Kraft, Administratrix.

**REPLEVIN FROM THE ESTATE OF A DECEASED
MORTGAGOR.**

[Common Pleas Court of Butler County.]

DAVID LINGHLER V. FLORINTINE KRAFT, ADMINISTRATRIX.

Decided, December 19, 1905.

Mortgage—Rights of Mortgagee—Upon Death of Mortgagor in Possession of Goods—Replevin not Available,

Where a mortgagor in possession of goods dies, and his administrator proceeds to administer the same in accordance with the statute regulating the administration of estates, the mortgagee can not maintain an action of replevin against the administrator for the possession of the mortgaged property, even though the condition in the mortgage was broken at the time of the death of the mortgagor. In such case his interest in the property, under his mortgage, under the administration act, is transferred to the fund arising from the sale by the administrator.

KYLE, J.

The only question presented by the demurrer to the petition and considered by the court, is the question as to whether or not the plaintiff under the allegations of his petition may maintain an action of replevin against the defendant, for the reason that the defendant is the duly appointed administratrix of Frantz Kraft, and took possession of the property that is sought to be recovered in this action as said administratrix.

It is claimed by plaintiff, that the defendant's right could not be greater than her decedent's, and that if the plaintiff could maintain an action of replevin against the mortgagor in his lifetime, the same right would exist as against his personal representative.

The answer to that might be that the defendant in her fiduciary capacity, as such, is not the claimant of the property, but holds it only for certain purposes, and these are fixed and definite, under the administration act.

It has been held, in case of assignment by a mortgagor of personal property, that the mortgagee can not maintain an action against the assignee for converting the property to his

own use. In such cases, his interest in the property under mortgage, where the assignee is clothed with authority to sell the goods, is preserved to the fund arising from the sale by the assignee. And it will make no difference that the condition in the mortgage was broken at the time of the assignment. *Lindeman v. Ingman*, 36 O. S., 1.

Since an administrator is an officer of the probate court making the appointment, such court acquires jurisdiction of all the property coming into the hands of such administrator for the purpose of the administration of the estate.

The administrator, by virtue of his appointment, becomes a trustee for the benefit of the creditors of the estate.

In *Kilbourne v. Fay*, 29 O. S., 279, the court says:

"I shall not stop to cite cases wherein the executor or administrator has been held to a trustee for the benefit of the creditors of the estate. The provisions of the 83d section of the administration act, above quoted, clearly establishes that relation. The ordinary course of administration is the means and processes provided by law whereby creditors of the deceased debtor received payment."

The plaintiff comes in here, not claiming a lien, but claims to be the owner of the property sought to be replevined. That the mortgagor or his personal representatives have no interest in the property after condition broken is not the law in this state.

In *Lindeman v. Ingman*, 36 O. S., 13, the court says:

"It is said, however, that the mortgagee, after condition broken, has no *lien* upon the property as he is the *owner* and hence that the statutory provision, to which reference has been made, does not apply. That the mortgagee is the owner in the sense that there is no interest in the mortgagor remaining after condition broken, which the mortgagor, his creditor or assignee can assert, is a proposition which finds little support elsewhere and, as we have seen, none in Ohio."

Under the administration act, Section 6090, every administrator shall proceed with diligence to pay the debts of the deceased and shall apply the assets to the payment of debts in a

fixed order. And Section 6091 provides that nothing in the preceding section shall affect or impair any lien, legal or equitable, which any creditor or other person shall have upon the personal estate of the deceased during his lifetime.

In the administration of estates, the law preserves the rights of all lien holders upon personal property passing into the hands of the administrator. The ordinary course of administration is the means and processes provided by law whereby creditors, including those having preferred claims upon the personal property of deceased debtors, receive payment.

Upon the death of the decedent and the appointment of the administratrix, the means were set in motion to administer the estate and pay the debts of the defendant's decedent, which included the mortgage claim of the plaintiff.

By the appointment of the administrator the probate court acquired jurisdiction of the mortgaged property claimed in the petition through the possession of such administrator and acquired the right to proceed according to the provisions of the administration act to convert the same into money and pay the debts of the decedent, preserving to the plaintiff all his rights under his mortgage.

The defendant, by virtue of her appointment and possession of the mortgaged property, became the trustee for all the creditors of the estate, and if she was trustee for the benefit of all the creditors of Frantz Kraft, she was also the trustee for the plaintiff in this action; and if the defendant administratrix is the trustee for plaintiff in this action, then the plaintiff is seeking to sue his own trustee.

The rights of creditors can be asserted through the administrator as fully and effectively, but not always as speedily, as by judgment and execution against the property (29 O. S., 279; 58 O. S., 460).

Since the rights of the plaintiff to the mortgaged property are preserved under the administration act in the hands of the administrator, and since such administrator, by virtue of his appointment, becomes the trustee for all the creditors of the estate, including this plaintiff, even though condition broken,

after the administrator has taken possession of mortgaged property in due course of administration, mortgagees can not maintain an action to replevin such property from such administrator and can only assert their claim and lien against the money arising from the proceeds of such property in the hands of such administrator.

The doctrine has never been carried so far in the decided cases as to determine that a mortgagee of chattels under a mortgage in due form and condition broken, its validity not being questioned, is limited, and can only claim his rights under his mortgage through the administrator, yet the principles laid down in the decided cases, if carried out in their logical conclusion, would result in that being held to be the law.

Taking that view of the case, the demurrer to the petition will be sustained.

Warren Gard, for plaintiff.

Aaron Wesco and *Alexander Hume*, for defendant.

1905-6.]

State, ex rel, v. Shay.

PROCEEDINGS AGAINST AN ATTORNEY FOR CONTEMPT.

[Common Pleas Court of Hamilton County.]

THE STATE OF OHIO, EX REL JACOB SHRODER AND THOMAS H.
DARBY, v. THOMAS F. SHAY.

Decided, February 17, 1906.

*Contempt—Misbehavior of Attorney—In the Presence of the Court—
Inherent Right of the Court to Try Him—Notwithstanding Affidavit of Prejudice—Abandonment of Client in Criminal Case—
What Constitutes Relation of Attorney and Client—Rights of the
Accused—Withdrawal of Attorney for Refusal to Pay Fee—An
Obstruction of Justice and Contempt of Court, When.*

1. When an attorney is charged with a contempt because of misbehavior in the presence of the court, the judge in whose presence the misbehavior took place has an inherent right to try the case. The General Assembly can not abridge this right, and the statute giving a party the privilege of filing an affidavit of prejudice on the part of the judge was not intended by the Legislature to enable a defendant in a case of contempt in the presence of the court to take the trial of that case before another judge.
2. An attorney who disregards an order of court upon the ground that it was not technically correct in its terms is guilty of contempt.
3. When the attorney for a defendant in a criminal case has abandoned his client on the day of trial, and the defendant can not give bond and secure a lawyer to look after his interests until his paid attorney can be found, it is proper for the court to appoint counsel for the defendant, if he has no means to employ a lawyer. This action of the court does not, however, discharge the paid attorney from the case, for the court has no power to dismiss a lawyer from his client's service.
4. A proposal and acceptance will constitute the relation of attorney and client; and as long as the former remains an attorney in the case, he is bound as an officer of the court not to impede the business of the court by neglecting his duty to his client.
5. The rights of a defendant in a criminal case must be protected by the court. Among these rights is the right to a proper defense. When an attorney, who is an officer of the court, assumes the defense of a prisoner at the bar, he must do his duty in the premises. His correct conduct as an officer of the court involves the dignity of the court itself. When the misbehavior of an attorney interferes with the work of the court, it amounts to a contempt of

State, ex rel, v. Shay.

[Vol. III, N. S.]

court. The abandonment of a defendant in a criminal case on the day of trial by an attorney who has agreed to undertake the defense, when there is no cause for such abandonment except that the fee was not all paid, and the work of the court is thereby interfered with, is misbehavior which amounts to a contempt of court.

LITTLEFORD, J.

This is a proceeding brought against Thomas F. Shay on a charge of contempt of this court in that he abandoned a client in a criminal case on the day of trial. The first count in the information is as follows:

“That the said Thomas F. Shay on the 11th day of January, 1906, was willfully guilty of misbehavior as an officer of this court in the performance of his official duties and in his official transactions, in this—

“That a certain true bill of indictment was reported and filed in this court on November 25, 1905, by the grand jury of said county charging one Frank Casey with embezzlement, and being numbered 14,032 of the records of this court; and said Thomas F. Shay had theretofore been regularly employed by and on behalf of said Frank Casey as his attorney and counsel to represent and defend him on said indictment and was then such counsel, the said Frank Casey at all times herein stated being confined in the county jail of said county in default of bail.

“And that on January 6, 1906, by order of this court, in accordance with the practice long continued in such cases, and which said practice was known to the said Thomas F. Shay, said indictment and said cause against said Frank Casey was set for trial and hearing to be had on January 11, 1906, and notification of said setting was duly sent to said Thomas F. Shay and received by him, and other notice of said setting being also received and had by said Thomas F. Shay as attorney and counsel aforesaid.

“That upon said 11th day of January, 1906, in accordance with said order of court said indictment and cause was regularly called for trial in open court, and the court, the jury, prosecuting attorney, and the state's witnesses being in attendance and the said Frank Casey being brought into open court in custody of the sheriff, the said Thomas F. Shay willfully neglected and failed to attend upon said trial and then and there failed to show cause, or have cause shown, for his said absence; and without the consent of or notice to said Frank

1906-8.]

State, ex rel, v. Shay.

Casey willfully abandoned said cause and said prisoner so that the administration of justice was obstructed and the said court embarrassed in the performance of its duties and was unable to proceed with said trial, and said court was compelled to adjourn and discharge said jury and witnesses and was unable by reason of the premises to transact the business of this court."

The second count alleges that after Mr. Shay failed to appear on January 11 as set forth in the first count, the court adjourned the trial to January 15, and that a notice was sent to Mr. Shay of the setting of that day, which notice he received; but he again failed to appear, so that justice was obstructed and the court embarrassed in the performance of its duties.

The answer of the defendant denies that he was ever the attorney for Casey except on conditions which had not been complied with; denies that the case was set for January 11, or that Mr. Shay ever received any notice of such setting; and denies that Mr. Shay willfully failed to attend the trial or that he embarrassed the court in the performance of its duties. The answer further alleges that on January 11th, the court assigned Mr. Salzer to be counsel for the defendant. As to the second setting of the case, January 15, the answer alleges that Mr. Shay wrote to Mr. Morris, the assistant prosecuting attorney, that he could not attend in this court on January 15th, because of business elsewhere; and that Mr. Shay was, in fact, on that day engaged in the Common Pleas Court of Union County, at Marysville, Ohio.

The failure of Mr. Shay to appear in this court to defend Casey on January 11th and 15th amounted to what is called "misbehavior in the presence of the court"—that is, the court could see that Mr. Shay was not present, and it devolved upon him to show why he was not there, the court having by an entry set the day for trial. This court had the right, therefore, to try this defendant under Section 5639 without the appointment of a committee and the putting of the charge in writing. But Mr. Shay requested that the charge be put in writing, and in order that everything might be done calmly, the court complied with his request.

An affidavit, charging this court with bias and prejudice against Mr. Shay was filed before the trial began. It is held in *Hunt v. State*, 5 C. C.—N. S., 621, 3d syl., that a defendant in a contempt case may file such an affidavit if the act in question was done not in the presence of the court; but there is no precedent for such an affidavit in a case like the one at bar. The fact that a trial on written charges was granted to the defendant here does not entitle him to the further privilege of taking the case from this court to be tried before another judge.

In *Hale v. State*, 55 O. S., 210, the Supreme Court of Ohio has held that the General Assembly is without authority to abridge the power of a court created by the Constitution to punish contempts summarily, such power being inherent and necessary to the exercise of judicial functions. The result is that even if the statute giving the right to file an affidavit of prejudice was intended by the Legislature to apply to cases of misbehavior in the presence of a court, the statute would be of no force; for the right to try a contempt committed in its presence is inherent in a court. Otherwise the judge in whose presence the misbehavior took place might have to appear as a witness to prosecute the contempt charge before a brother judge, who would, perhaps, have to pass upon the credibility of his colleague. A judge could not protect the dignity of his court in this way, but would only lessen it.

The facts established in this case are as follows: Frank Casey had been a client of Mr. Shay's for a long time. Five times, Mr. Shay says, he had appeared to defend Casey, and he had received \$20 in all for these services. In October, 1905, Casey was arrested by a man for whom he sold goods on part payments. Mr. Shay appeared for him in the police court and had the charge dismissed; but the grand jury took the case up and found a true bill against Casey for embezzlement. Casey was put into jail. Mrs. Casey, the mother of Frank, a widow, old and poor, undertook to pay Mr. Shay to defend her son. She visited him from time to time and paid him small sums, for which he signed receipts. On January 2d she paid him \$5, which was the last payment made, and which she says she told him was the widow's mite. This was a few days before the

1905-6.]

State, ex rel, v. Shay.

Casey case was set for trial. Mrs. Casey paid Mr. Shay in all \$30. The receipts are signed by Mr. Shay himself.

On Saturday, January 6th, a postal card from the prosecuting attorney addressed to Mr. Shay was put into the mail, notifying him that the Casey case was set for trial Thursday, January 11th. On January 9th an entry was made on the journal setting the case for the 11th. The *Court Index* of January 10th and 11th noted the setting of the case.

On Thursday, January 11th, the case was called for trial between 11:00 and 11:30. The witnesses for the state were on hand, but the defendant was without either witnesses or attorney.

The court, therefore, had a telephone message sent to Mr. Shay's office, telling him the Casey case was for trial. Mr. Jones, one of Shay & Cogan's office clerks, came to the prosecutor's office and said that Mr. Shay was out of town, which was not true. Mr. Jones on the stand was not able to explain why he made this assertion, nor why, when he returned to the office at noon and found Mr. Shay there, he failed to at once telephone to the prosecutor's office and correct the mistake, if it was a mistake; for he knew the court was trying to locate Mr. Shay.

The court assigned Mr. Salzer to act as counsel for Casey, and adjourned the case to Monday, January 15. The case of *State v. Ingram* proceeded to trial, and after a verdict about 1:30, the court adjourned for the day because there was no further business.

The next day, January 12th, Mr. Shay not having appeared, the court sent for Mr. Cogan, Mr. Shay's partner. Mr. Cogan in open court said that the Casey case was in the hands of Mr. Shay. The court told Mr. Cogan to tell Mr. Shay to come up to the court house and explain his absence the day before. Mr. Shay did not respond, and on the same afternoon, the court directed Mr. Morris, of the prosecutor's office, to write to Mr. Shay, telling him the Casey case was set for Monday, January 15, and to ask him to be on hand. This letter Mr. Shay received, and answered by saying that he would be "delighted to comply with the judge's request," but that he would be actively engaged elsewhere on the 15th.

The case against Casey, therefore, proceeded to trial on January 15th with Mr. Salzer as attorney for the defense. Mr. Salzer had been able to find Mr. Shay at his office for consultation only once, Saturday afternoon, January 13th. He obtained from Mr. Shay at that time the documents to be used by Casey in his defense against the charge of embezzlement, and other information; but it was not possible for Mr. Salzer to properly prepare the case by Monday morning. He did all that could be done, but the defense went in badly and Casey was convicted.

The court then issued a rule against Mr. Shay citing him to appear and show cause why he should not be held in contempt for failing to defend Casey.

On the afternoon of Tuesday, January 16th, Mr. Shay appeared in court and demanded that his case be taken up. The court was at the time engaged in the consideration of the special charges presented by counsel in the Casey case, which was then nearly done. The court declined to go into the matter with Mr. Shay until the business in hand was disposed of. Mr. Shay thereupon tore up the rule and threw it into the cuspidor, saying the writ was of no force, and using loud and insulting language to the court, to which no reply was made; but the court directed the sheriff to detain Mr. Shay in the court room under Section 5641, Revised Statutes, which provides that—

“This section shall not be so construed as to prevent the court from issuing process to bring the accused party into court, or from holding him in custody pending such proceedings.”

The arguments in the Casey case were brief, and after the jury retired, Mr. Shay was called to the bar and told by the court that he was charged with contempt in failing to appear to defend Casey on January 11th and January 15th. Upon Mr. Shay's demand that the charges be put in writing, the court granted the request although the court had the right to proceed summarily under Section 5639, Revised Statutes, as said above. The next day the court appointed as a committee, Judge Jacob Shroder and Mr. Thomas H. Darby, Assistant United States District Attorney, to prepare the charges.

Mr. Shay had called Mr. Lawrence Maxwell and Judge Outcalt into some litigation in the United States Court as associate

1905-6.]

State, ex rel, v. Shay.

counsel some time before, and to these gentlemen he now turned for help.

On Friday, January 19th, Judge Outcalt and Mr. Shay asked for a conference with the committee, which was granted. The two went to Judge Shroder's office and there met Judge Shroder and Mr. Darby.

What was this visit to the committee for? On the stand Mr. Shay said repeatedly that it was to find out what he was charged with. He denied over and over again that the court had told him what the charge was when he appeared in response to the rule. But there were several affidavits which had been filed by his counsel in the effort to have the case sent to another judge asserting that Mr. Shay had been told of the charge against him openly by the court, and these were called to his attention on cross-examination. The next day on the stand Mr. Shay took back his first claims, and admitted that he and Judge Outcalt went to see the committee to explain why he had failed to defend Casey. They knew, therefore, when they went to the committee, that they must account for Mr. Shay's failure to appear in this court on January 11th and 15th.

This visit was made three days after the committee had been named. Mr. Shay and Judge Outcalt had had three days to decide what Mr. Shay's defense was. When they came before the committee they said Mr. Shay had been prevented from defending Casey by absence from the city—that he had been absent from Christmas up to and including January 11, the day when the Casey trial was first called. On January 11th and 15th they said Mr. Shay was in Marysville, Ohio. Judge Shroder and Mr. Darby were both called to the stand by the court and both swore positively that these statements were made.

By a mere chance the committee knew that Mr. Shay was in town on January 2 and January 11. Otherwise, this matter might have ended then and there by the committee taking Mr. Shay's word. A lawyer can tell where he was a week ago by asking his family, his friends, his clerks, his business associates, and looking at his own records and the court records; but no one else could prove where he was. To know which way to turn for witnesses to prove that he was in town on a certain

day would be impossible. The committee chanced to have Mrs. Casey's last receipt from Shay, dated January 2; and they knew that Joe Casey, the brother of Frank, had visited Frank in jail on January 11th, and had then called upon Mr. Shay to find out why he had failed to be in court that morning.

The committee told Mr. Shay that they had evidence that he was in town on January 2d, and also a witness who would say that he met Mr. Shay January 11th. The name of this witness was demanded by Judge Outcalt, but the committee discretely refused to give it. He insisted, but the committee remained firm.

Then Judge Outcalt and Mr. Shay agreed to make a further investigation of Mr. Shay's whereabouts on January 11th, and to provide the committee with what they called documentary proof where Mr. Shay was during that entire week. The proof was never furnished.

Four days after the first interview, Judge Outcalt, on January 23, asked Mr. Darby to come to his office. Judge Outcalt says he had been looking everywhere to find out where Mr. Shay was on the 11th. He told Mr. Darby that Mr. Shay was in the United States Court in Cincinnati on Tuesday and Wednesday, January 9th and 10th, but he again asserted that Mr. Shay was in Marysville on Thursday, January 11th.

At this interview Judge Outcalt held in his hand the *Court Indexes* of January 10th and 11th. In them are noted proceedings of the United States Court of the 9th and 10th, in which Mr. Shay was counsel. If Judge Outcalt had looked at the *Court Index* of January 12th, he would have found in the United States District Court column but two things which had been done in that court the day before, and in both of them Mr. Shay was of counsel. But unfortunately Judge Outcalt did not examine the *Index* of the 12th. Judge Outcalt might have learned from Mr. Sidney Cowen, the deputy clerk of the United States Court, that Mr. Shay was in that court for a short time on the morning of the 11th; but again unfortunately he failed to inquire of Mr. Cowen, although he did inquire of Mr. Georgi, of the clerk's office, who could give him no information. All this goes to show how completely Mr. Shay had led

1905-6.]

State, ex rel, v. Shay.

Judge Outcalt to believe that on January 11th Mr. Shay was in Marysville, Ohio.

There is no doubt that Judge Outcalt made the statement to Mr. Darby the second time that Mr. Shay was in Marysville on the 11th. When Mr. Darby was called to the stand by the court and testified that Judge Outcalt told him this, Judge Outcalt interrupted him to ask, "Who said that?" Mr. Darby replied, "Judge Outcalt." When Judge Outcalt took the stand he at first denied that he had made such a statement, but later admitted that he might have said it, and finally said that he very likely did say it. It is proved that he did.

After this second assurance from Judge Outcalt that Mr. Shay was in Marysville on January 11, Mr. Darby went to Marysville. There he found that the day Mr. Shay was in Marysville was Friday, January 12th, and not Thursday, January 11th. The hotel register settled that fact. The committee thereupon filed charges.

Thus for just one week after he was charged by this court with contempt in failing to appear to defend Casey on the 11th, Mr. Shay and Judge Outcalt persisted that Shay was in Marysville on the 11th. The probability of one of the committee making a two days' trip to find out was so remote, that Mr. Shay thought he would chance it.

It is important in determining the guilt or innocence of a man to know what he said when he was first accused, and whether he told the truth or a lie. That is why this Marysville story cuts an important figure in deciding this case. If Mr. Shay had had any honest reason for failing to defend Casey, he would have given it in the first place.

The falsity of this first defense having been exposed, other defenses were set up. These will be considered.

One of them is based on a fine technicality, but is without merit. The postal card sent to Mr. Shay on January 6th stated that the Casey case was set for trial January 11th. The entry setting the case for the 11th was really not made until January 9th. The postal should have said that the case *will be* set for the 11th. But the prosecutor was under no obligation to send the card at all; it was Mr. Shay's business to watch the docket.

No matter if the card was technically inaccurate, it gave notice to Mr. Shay that the Casey case would be tried on January 11th, and that is why it is important as evidence against Mr. Shay. If he had got a telephone message, through the courtesy of the prosecutor, of the setting of the case, to detect a little flaw in the message would not be an answer to the charge that the message warned him of the coming trial of the case. It is held in *Territory v. Spiess*, 37 P., 1109, that an attorney who disregards the order of a court upon the ground that it was not technically correct in its terms is guilty of contempt.

This leads up to the question whether or not Mr. Shay got this postal card. He told the committee that he did not, and he says so yet. Eight other postal cards noting cases for trial were put into the mail January 6th together with the one to Mr. Shay. The letter book of the prosecutor's office shows that they were all copied together. These eight postals to the other lawyers are all accounted for, and are in evidence, all stamped with the postmark January 6, 1:00 P. M. In the regular course of business the card to Mr. Shay, according to the testimony of Mr. Megrue, superintendent of mail delivery, would arrive at Mr. Shay's office some time after one o'clock. Mr. Shay was handed his mail that afternoon, but he says this postal was not in his mail. Mr. Cogan and Mr. Jones say they did not see it. But Richmond and Renan, the other two clerks in the office, were for some reason not called. It is hard to believe that this postal out of the whole number miscarried. A letter properly directed and placed in the post office raises a presumption that it reached the person to whom it was addressed (*Rosenthal v. Walker*, 111 U. S., 185, 193; *Henderson v. Carbonate Coal Co.*, 140 U. S., 37). This presumption may be overcome by the denial of the addressee, if his credibility is good; but Mr. Shay's word has so little weight that the presumption holds good.

It is claimed that the assignment of Mr. Salzer as attorney for Casey on Thursday, January 11th, involved the finding that Mr. Shay was not the attorney for Casey and discharged him from the case. There are two answers to that argument. In the first place Mr. Salzer was not appointed until about 11:30

1905-6.]

State, ex rel, v. Shay.

on Thursday morning, and Mr. Shay was through with the Holzman matter in the United States Court at 10:45, so that he had three-quarters of an hour to get to this court after leaving the United States Court, if he had wanted to come. He had decided not to come before Mr. Salzer was appointed. In the next place, the court could not discharge Mr. Shay from his employment in the case. If the appointment of Mr. Salzer was not justified because Casey had an attorney, then the county might refuse to pay Mr. Salzer's bill. But the proposition that a court may dismiss a defendant's attorney is not sound. Mr. Justice Field in *Ex parte Garland*, 4 Wall. (U. S.), 333, says:

"The attorney and counsellor, being by the solemn judicial act of the court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and argue cases is something more than a mere indulgence, revocable at the pleasure of the court," etc.

The fact is the court appointed Mr. Salzer because Casey was in jail and needed some one to look after his interests until Mr. Shay could be found, and also to help find Mr. Shay. The court not only had no power to dismiss Mr. Shay from the case, but it had no intention to do so. The fact that on Friday the court told Mr. Morris to send a letter to Mr. Shay asking him to be on hand Monday was enough to let Mr. Shay know that the court had no intention of dismissing him from the case, and that it still looked upon him as Casey's attorney.

One defense set up is that Mr. Shay's business in the United States Court on Thursday kept him from attending in this court. The evidence does not support this claim. Mr. Shay's movements on that day as proved by his own witnesses are as follows: From 9:00 until 10:45 Mr. Shay was in and about the United States District Court attending to the decree granting an injunction in the Holzman case. This was entered at 10:45, the time being noted on the entry because it was a proceeding in bankruptcy. After 10:45 Mr. Shay was not again in the United States Court. If he had come to this court, he would have been in good time for the Casey case, which was not called until after 11:00. After leaving the United States Court he went to his office. Later he saw Mr. John Doyle with

reference to some collateral. That afternoon Joe Casey saw Mr. Shay at his office and told him the Casey case had gone over to the 15th, and Mr. Shay said he would see Frank Casey, the defendant, the next day.

Mr. Shay says he went home early in the afternoon of the 11th, as he was worn out. Mr. Maxwell says that the petition for appeal and amended answer in the Holzman case were prepared by himself at his office, and that he signed Mr. Shay's name to them on the afternoon of the 11th and filed them in the United States Court because Mr. Shay could not be found on that afternoon. Thus Mr. Shay's own witnesses prove that he could have left the United States Court at 10:45 and arrived at this court before the Casey case was called for trial; or he could have appeared in this court at any time on January 11th up to 1:30 when this court adjourned, and the court could have arranged for the Casey case to go on during the afternoon by qualifying the jury, making the opening statements and perhaps beginning the state's testimony.

The fact is that Mr. Shay's presence in the United States District Court on the morning of January 11th was not at all necessary. He went there to attend to entering the decree granting an injunction in the Holzman case. This injunction had been allowed by Judge Thompson on Saturday, January 6th, and was in force from that time. The form and entry of the decree could have been attended to on some other day than the 11th. Mr. Shay's business, therefore, in the United States District Court for a short time on the morning of the 11th was no excuse for his failure to be on hand in this court that morning, and it only occurred to Mr. Shay as an excuse, together with some others, after the Marysville story was no longer possible.

It has been argued that this court can not hold Mr. Shay to account as an attorney in the Casey case because he never entered his appearance in court in that case. The defendant pleads orally in a criminal case and hence his attorney can not enter his appearance by a written pleading, as in a civil case. Neither has a defendant's attorney occasion to personally appear in court until the day of trial. The defendant may even

1905-6.]

State, ex rel, v. Shay.

be arraigned and enter his plea without the presence of his attorney according to the statutes. There is no such thing as a lawyer having to appear in a criminal court to tell the judge that he is attorney in a certain case, as counsel for defendant have maintained.

A proposal and acceptance will constitute the relation of attorney and client (*Blyth v. Fladgate* [1891], 1 Ch. Div., 337; *Smith v. Black*, 51 Md., 247; *Perry v. Lord*, 111 Mass., 504). After the attorney is once employed notices from the court should be sent to him and not to his client. Mr. Shay had agreed to defend Casey, had received a part or all of his fee, had been given the documents upon which the defense was based and had got the consent of the prosecutor to reduce Casey's bond from \$1,000 to \$500. Mr. Shay was the proper person to whom notice of the setting of the case should be sent, as it was; and so long as he remained as attorney in the case, he was bound as an officer of the court not to impede the business of the court by neglecting his duty to his client.

That brings us to the question whether or not he did obstruct the administration of justice by his conduct, for one of his many defenses is that he did not.

In a criminal case, if the attorney for the defendant is not present, no steps can be taken. In a civil case, the plaintiff may take judgment by default. In a criminal case the court comes to a standstill. When Mr. Shay failed to appear on the morning of January 11th, or even to have a representative present, this court was at a loss when to order the return of the witnesses for the state. They should have been dismissed until the afternoon, when the Casey case could have been heard. Instead of that, the court was compelled to postpone the case to Monday, January 15. Business was thus obstructed on the morning of January 11, and in the afternoon of that day the court had to adjourn because Mr. Shay was not on hand.

On Monday, January 15, Mr. Shay again failed to appear to defend Casey. He went to Marysville on that day, not to attend to a case set in court, for Mr. Ayres, Shay's associate counsel in Marysville, says that after January 8th there was no setting on the docket of that court. The matter in Marysville was a

settlement about which all parties had already agreed. Mr. Ayres had not even requested Mr. Shay to be there. His telegram to Mr. Shay read:

"Marysville, O., Jan. 13th. Thos. F. Shay, St. Paul Bldg. Berkshire plea guilty, five hundred dollars pays. Send check. D. W. Ayres, 2 P. M."

Mr. Shay could have secured the Berkshire plea in writing, which he did, and sent it with the \$500 check to Marysville; or he could have gone there some day later in the week.

His absence from this court Monday resulted, as has been already said, in a lame presentation of the defense in the Casey case, which will make it necessary to set the verdict of guilty aside and retry the case. Thus did Mr. Shay obstruct the administration of justice on Monday.

What real reason had Mr. Shay for not appearing to defend his client? Out of his own mouth he has answered the question. He has said again and again that he was not paid all of his fee and that he never intended to appear if his fee was not all paid.

Fidelity to clients has brought more honor to the legal profession in the eyes of the world than any other thing. Without proper pay, sometimes without thanks, lawyers have stood in defense of their clients, from time immemorial, faithful and unafraid. That a lawyer may desert his client in a criminal case in the hour of his peril, because the fee was not all paid, is inconsistent, in the opinion of this court, with the ethics of the profession.

But this case is really worse than that. Mr. Shay abandoned Casey because he did not get as much money as he thought he ought to have, and not because Mrs. Casey had failed to pay all of an agreed fee. Mr. Shay says that his agreement with Mrs. Casey was for a fee of \$250—\$125 to be paid before the trial and \$125 after the trial. Mrs. Casey was utterly unable to pay any such fee for her son's defense. Mr. Shay knew that. He had defended her boy five times previously and says he had been paid in all \$20. Mrs. Casey is a little old widow without any means and without even any regular employment. Her son

1905-6.]

State, ex rel, v. Shay.

Frank, upon whom she depended, was in jail and without a dollar. Mrs. Casey's slender means had been known to Mr. Shay for a long time. She was now in a worse state than ever because her son was in jail. She paid Mr. Shay \$30 in small sums, and she says he asked her to bring what she could and they would not quarrel about the amount of the fee. Is it possible to believe that this woman ever agreed to pay Mr. Shay \$250, or that he ever supposed she could raise \$125 in cash before the trial? The conclusion is inevitable that Mr. Shay abandoned Casey because at that time he had a more profitable client, Mr. O'Dell, to pay him for his time.

When Mr. Salzer saw Mr. Shay at the latter's office on the afternoon of Saturday, January 13th, Mr. Shay did not then disclaim being Casey's attorney, but merely said he had other things to attend to and could not cut himself in two. Monday morning on the train to Springfield Mr. Shay, speaking of the Casey case, said to Mr. Sawyer he would not try an embezzlement case for \$30. On Tuesday, January 16, Mr. Shay told Mr. Morris that he had only got \$30 in this case and had not intended to defend Casey on this account. On the same day he made much the same statement to Mr. Rulison.

All the evidence goes to show that Mr. Shay expected to defend Casey only in case there was nothing more profitable to attend to when the trial came on. It happened that he had Mr. O'Dell as a client in the cases in the United States Court and in Marysville when the Casey trial was set. He got his clerk, Mr. Jones, to tell the prosecutor he was out of town and left Casey to his fate. He intended to keep the \$30 paid by Mrs. Casey, and trust to luck. The chances are ninety-nine out of a hundred that a court will not go into the unpleasant task of citing a headstrong attorney like Mr. Shay to appear and explain such matters as this. Mr. Shay thought the court would most likely assign some young lawyer to defend Casey, and let matters go at that. Mrs. Casey is very humble and very poor, so any complaint she might make would not amount to much. Mr. Shay was willing to take all the chances and keep the \$30.

Unluckily, for Mr. Shay, this court was not disposed to look upon his shortcomings as a light matter, not to shrink from in-

investigating his conduct because of time and trouble. This contempt case has taken a week to try; but it was a week well put in. To guard the honor of the bar and the rights of clients is the first duty of the court.

The rights of a defendant in a criminal case must be protected by the court. Among these rights is the right to a proper defense (Section 7245 and Section 7246, Revised Statutes). When an attorney, who is an officer of the court, assumes the defense of a prisoner at the bar, he must do his duty in the premises. His correct conduct as an officer of the court involves the dignity of the court itself (*Bowling Green v. Todd*, 52 N. Y., 493). For an attorney to undertake to appear and then not to appear is a contempt of court (Weeks on Attorneys, Section 97). When the misbehavior of an attorney interferes with the work of the court, it amounts to a contempt of court (*Jones v. Earl of Bath*, 4 Modern, 367).

In conclusion the court is of the opinion that it is proved beyond a reasonable doubt that Mr. Shay was the attorney for Casey; that the postal notice sent to Mr. Shay was received by him and that he willfully neglected to attend the trial and willfully abandoned Casey, thus obstructing the administration of justice; in short, that Mr. Shay is guilty under both counts of the information.

Coming to the question of punishment, two things are generally taken into consideration—the reformation of the defendant and the good effect of his punishment on others.

As to the reformation of this defendant, his notions of right and wrong will always remain just what they have been shown to be in this case. A heavy punishment would have no effect upon him.

As to the good effect of his punishment upon others, let it first be said that there are but few out of nearly eleven hundred lawyers at this bar who need a caution as to their ethics. It is to be hoped that these few will be sufficiently warned by the public exposure of Mr. Shay's conduct in this case.

Unwilling, therefore, to sentence him to jail because it will do him no good and believing that these proceedings will be a sufficient warning to any member of the bar who is inclined to

1905-6.]

Mutual Aid Association v. Bleher et al.

forget his duty to his clients, the court will let Mr. Shay go forth punished only by the shame which his own base conduct has brought upon him in this matter. The defendant is discharged.

Jacob Shroder and Thomas H. Darby, for the state.

Lawrence Maxwell, Jr., and Miller Outcalt, contra.

"LEGAL REPRESENTATIVES."

[Common Pleas Court of Clermont County.]

KNIGHTS T. & M. M. AID ASSOCIATION V. OLGA BLEHER ET AL.

Decided, January, 1906.

Mutual Benefit Societies—Construction of the Words "Legal Representatives"—Section 3630, Revised Statutes, Before and After Amendment.

1. Section 3630, as originally enacted April 20, 1872 (69 O. L., 82), and amended February 3, 1875 (72 O. L., 23), authorized mutual relief associations to provide in their certificates for payment only to the family or heirs of the member as the beneficiary.
2. As amended March 31, 1891 (88 O. L., 251), it authorized them to provide for payment to the "families, heirs, executors, administrators or assigns" of the member.
3. The words "legal representatives" used to designate the beneficiary in such a certificate, issued prior to the act of March 31, 1891, mean the "family and heirs of the deceased member," and not his administrator or executor.

This was a case of interpleader in which the plaintiff brought into court the fund payable under its certificate and asked the court to decide between the conflicting claimants.

[Cases cited: *State v. S. L. A.*, 38 O. S., 281; *N. Y. Mutual L. I. Co. v. Armstrong*, 117 U. S., 597; *K. T. & M. M. A. A. v. Green*, 79 F. R., 461; *Walsh v. Walsh*, 143 N. Y., 662; *In re Hess Estate*, 20 Circuit, 703; *Tafel, Admr., v. S. C. K. G. R.*, 12 W. L. B., 35; *Masonic M. M. A. v. Jones*, 154 Pa. St., 99; *same v. same*, 154 Pa. St., 107; *N. M. A. A. v. Gonser*, 43 O. S., 1.]

PARROTT, J.

The court finds:

1. That the plaintiff issued certificate No. 715 to John C. Bleher, July 23, 1878, and in said certificate his beneficiaries are designated by the words "legal representatives."

2. That at the time said certificate was issued the association was limited, by statute, to the issuance of such certificates to "the families and heirs" of its deceased members, and under this section of the statutes the Supreme Court of Ohio held that any designation of beneficiaries outside of the "family and heirs" of the deceased members was against public policy and void (*State v. S. L. A.*, 38 Ohio State, 281).

3. That March 31, 1891, the section of the statute governing and determining who should be beneficiaries in such certificates at the time of issuance of certificate No. 715 to John C. Bleher was amended, authorizing the plaintiff, upon accepting the provisions of said amended act, to name as beneficiaries in its certificates the families, heirs, executors, administrators or assigns of its deceased members, *as such member might direct*.

4. That in 1893 the plaintiff association accepted the provisions of said amended act and amended its by-laws to conform therewith, and at the same time provided that those then holding certificates could change the beneficiaries named in the certificates by filing a petition therefor and complying with the requirements of said by-law.

5. That John C. Bleher never made any change in his certificate as originally issued, but continued to pay the assessments on the same to his death, September 1, 1905.

6. That John C. Bleher died, leaving Olga Bleher, his widow, Lillian and Mabel Bleher, his daughters, and Dorothy and Edith Peterson, granddaughters. His widow, Olga Bleher, is the duly appointed administratrix of his estate.

7. The fund of \$2,000, due on certificate No. 715, is claimed by the administratrix for the estate of John C. Bleher and by the widow, children and grandchildren of the deceased as inuring to their benefit only.

The court finds upon the legal questions involved:

1. That the words "legal representatives," as used in certificate No. 715, must be construed in relation to the statute as it then existed, governing such certificates, and that under such statutes and the decisions of the courts, the beneficiaries of the certificate of John C. Bleher, No. 715, were at least up to the amendment of the act of 1891 the "family and heirs" of decedent, and were so understood by him and the association.

2. If so, did the acceptance of the provisions of the amended act in 1893, by the association, without any act on the part of John C. Bleher, in and of itself, change the relation of John C. Bleher to the association, and without any act on his part, other than the payment of his assessments, change the then existing beneficiaries from "his family and heirs" to his administratrix as the representative of his estate? I think not.

3. Without entering into further discussion of the legal phases of this case I am of the opinion that the fund due on certificate No. 715 inures to the benefit of his widow and children, and not to his administratrix.

4. The court further finds that said fund should be distributed to the beneficiaries, as follows, to-wit:

(a) To Olga Bleher, the widow, one-half of the first four hundred, and in addition one-third of the balance of said fund.

(b) To Lillian Bleher and Mabel Bleher, each, the one-third part of said fund, after deducting the amount herein distributed to Olga Bleher.

(c) The balance of said fund, to be divided equally, share and share alike, between Dorothy Peterson and Edith Peterson. Judgment will be rendered accordingly.

Thornton M. Hinkle, for the association.

Davis & Davis and *E. K. Parrott*, for various defendants.

COMPETENCY AND EFFECT OF HYPOTHETICAL QUESTIONS.

[Superior Court of Cincinnati, General Term.]

WILLIAM C. McLEAN, AS ADMINISTRATOR OF THE ESTATE OF
PETER QUINCY, DECEASED, v. THE CITY OF CINCINNATI.

Decided, January, 1906.

Hypothetical Questions—Are Competent. When—What Facts may be Assumed—Exaggeration of Facts—Charge of Court—With Reference to Opinions of Experts—Evidence—Error.

1. A hypothetical question is not improper simply because it includes only a part of the facts in evidence, and counsel may assume the facts in accordance with his theory of them, if supported by the evidence of some of his witnesses. But if the hypothetical question contains material exaggerations of facts, and is unwarranted by any testimony in the case, it is improper and should not be allowed.
2. It is error to instruct a jury that the opinions of expert witnesses, based on hypothetical statements of fact, are of little value in case the jury find the hypothesis not in accordance with the facts. The jury should be instructed that the opinions are of no value.

LITTLEFORD, J.; FERRIS, J., and HOSEA, J., concur.

The petition in this case asks damages for the death of Peter Quincy, who is alleged to have been fatally hurt through the negligence of the defendant. On October 27, 1902, the man was driving along Morris Place about 7 P. M., when his horse ran into an obstruction in the street upon which there was no red light or other warning of danger. The wagon was overturned and fell upon Quincy's leg. His leg and his head were hurt by the fall. His leg was not hurt very seriously, but he had pains in his head, sometimes severe, from the time he was hurt until his death. On December 11, 1902, forty-five days after his injury, he had what his physicians said was a stroke of apoplexy. On December 17, 1902, fifty-one days after his injury, he died.

Three distinguished physicians called by the city testified that Quincy could not have died from apoplexy, because apoplexy never results from concussion. They said that brain lesion is the result of concussion, but the symptoms of brain lesion appear immediately after the injury to the head.

1905-6]

McLean, Adm'r, v. City of Cincinnati.

Relying evidently upon the testimony of these eminent physicians, the jury returned a verdict for the defendant.

The statements of these three physicians that apoplexy may result from uremia, excitement, over-eating, over-drinking, senility, etc., but never from concussion, and that apoplexy is often confounded with brain lesion, were all brought out by a hypothetical question which informed these experts, among other particulars, that Quincy first complained of pains in his head on November 21, 1902, a period of twenty-five days after his injury; that is, the hypothetical question contains the statement that "on the 21st of November he complained of headache," which, of course, means that he complained then for the first time.

As is said above, the fact is, Quincy had pains in the head from the time of the accident until his death, so that this statement in the hypothetical question is contrary to the undisputed evidence. Basing their opinion upon the hypothetical question containing this incorrect statement, these three physicians called by the city testified to the effect that the chance of Quincy's death being the result of the fall was so remote as to be almost an impossibility. How far these experts erred in their conclusion by reason of this mistake in the facts presented to them is not for a layman to say; but their opinion was of no value to the jury under the circumstances, and the question should not have been permitted. Had these physicians been informed of the true state of facts with reference to Quincy's head, it is not improbable that they would have stated, if it be true that concussion can not cause apoplexy but may cause brain lesion, that Quincy died from brain lesion, and that his two doctors simply made a mistake in giving apoplexy as the cause of his death, since the two are often confounded. Quincy died from some sort of brain trouble, although he was a healthy man before his injury, and these physicians might have thought there was some connection between the cause of his death and the accident had they been correctly informed as to the facts in the case.

A certain amount of latitude must be allowed in putting a hypothetical question. A question is not improper simply be-

cause it includes only a part of the facts in evidence (*Stearns v. Field*, 90 N. Y., 640). Furthermore, counsel may assume the facts in accordance with his theory of them if supported by the evidence of some of his witnesses, and the court should not reject the question on the ground that in his opinion such facts are not established by a preponderance of the evidence (*Quinn v. Higgins*, 63 Wis., 664). But if the hypothetical question contains material exaggerations of the facts and is unwarranted by any testimony in the case, it is improper and should not be allowed (*Williams v. Brown*, 28 O. S., 547).

The hypothetical question before us is, in our opinion, unwarranted by any testimony in the case. It was not only improper in the respect already mentioned, but there were other objections to it. The question is here given in full:

"Doctor, assume that the deceased was a colored man of fifty-six to fifty-seven years of age; that he had had apparently good health all of his life up to the illness which caused his death; that on the 27th of October, 1902, he had a fall from a spring wagon, on the street; that this fall caused a slight scratching of the skin; that it was treated only by washing and by an application of vaseline; that there was no fracture of the skull, and no treatment by the attending physician except for a slight fever; that there was an injury to the leg which caused the deceased to be laid up for eight or ten days, but which had no bearing on the cause of death; that after the recovery of the leg wound, decedent got up and went about his business; that on the 21st of November he complained of headache and was given treatment for that; that he was up and about attending to his business as janitor until the 11th day of December, when he went to bed, and showed some symptoms of stupor or paralysis of speech; that he was in a comatose condition from the 11th of December to the 17th of December, on which day he died; that there were no convulsions, that there was no apparent paralysis or paresis of the muscles; that there was no difference in the pupils; that the reflexes were normal; that there was no fever; that there was no incontinence of the feces or urine and no history of heart lesion; that death ensued forty-five days after the injury described; what, if any, connection was there between the injury of October 27th and the cause of death?"

As will be seen from the question, the statement is made that Quincy "had a fall from a spring wagon on the street"; the

1905-6.]

McLean, Adm'r, v. City of Cincinnati.

fact was that the wagon upset and fell upon his leg. Then comes the statement, "that this fall caused a slight scratching of the skin"; the fact was that the man's head was badly hurt. There are other points in this question also, without going farther, which are objectionable; but enough has been pointed out to show that the question in some respects was not warranted by any testimony in the case.

For the reason given we are of the opinion that there was prejudicial error in overruling plaintiff's objection to this question.

In its general charge, the court, speaking of the testimony of the experts in answer to the hypothetical questions, used the following language:

"If the question with this statement of fact put to the witness, upon which he expresses his opinion, does not embody the facts as you find them to have been established by the testimony, then the opinion is of little, if any, value in determining the issues in this case."

This instruction in our opinion was not correct. Rogers on Expert Testimony, Section 32, says:

"It is proper to instruct the jury to disregard the opinions of expert witnesses, based on hypothetical statements of facts, in case they find the hypothesis not in accordance with the facts."

It will not do under such circumstances to tell the jury that the opinion of the expert is of *little* value; they must be told that the opinion is of *no* value.

In *New Jerusalem Church v. Crocker*, 7 C. C., 327, 333, the court says:

"The jury should have been instructed that if they were of the opinion that any fact assumed by the witness, as the basis of his opinion, was not established by the evidence, they should regard his opinion as of no value, unless his testimony shows that such fact affected only the confidence with which the opinion was held."

In *Sharkey v. State*, 4 C. C., 101, 103, the following charge of the court below was held to be error:

McLean, Adm'r, v. City of Cincinnati. [Vol. III, N. S.]

"I need hardly remind you that an opinion based upon a hypothesis incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the nature of the opinion, is of little or no weight."

Again, in *West v. Knoppenberger*, 4 C. C.—N. S., 305, it was held to be error to give the following charge:

"If a question or statement of facts put to the witnesses upon which they have expressed an opinion, do not embody the facts as you find them to have been established by the testimony, then the opinion of said experts is of little, if any, value in determining the question in the case."

A very full discussion of the subject will be found in this latter case.

We think that this error in the charge was prejudicial to the plaintiff, and for the reasons given the judgment of the court below is reversed, and the verdict set aside.

William C. McLean and *D. D. Woodmansec*, for plaintiff in error.

John V. Campbell, for defendant in error.

END OF VOLUME III.

INDEX.

ABATEMENT—

Of action brought by administrator upon discovery that his appointment as administrator was not completed when suit was filed and two years has intervened since the accident. 45.

ABUTTING OWNER—

Mere delay in travel suffered by a property owner by the laying of a railway track in the street is *damnum absque injuria*, where there is an outlet from his property along the street without crossing the track. 109.

Interference with access to property by a railway track in the street, where the track is not opposite the boundary lines of the property produced. 109.

Whether Section 3283 relates to damages not covered by the Constitution—*Quære?* 109.

Has no recourse against municipality, which refunds street improvement bonds at a lower rate of interest, deriving a profit therefrom. 261.

ACCOUNTING—

The successor or wards of a guardian, who has become a non-resident after the approval of his account, may go into the common pleas for an accounting, and if anything is found due, may proceed upon the bond in the same action. 88.

ACTION—

Where pending for wrongful injuries at the time of the death of the plaintiff, and revived by his administrator, an amended or supplemental petition becomes necessary, setting forth the time of

death of the original plaintiff and whether death was due to the injuries alleged in his petition. 559.

A claim for interest paid to a village treasurer on public deposits can be recovered only by a suit by an officer or officers authorized to care for or protect such funds. 201.

Capacity of one to sue for recovery from a village treasurer of interest on public funds collected by him, can be questioned by special demurrer, but must be specially assigned. 201.

Rights of defendant company in suit to recover back money illegally paid out of county treasury for construction of bridges. 303.

Will lie for an assault committed by a care-taker of a public park while acting in the line of duty. 480.

May be brought by one in the capacity of a tax-payer the moment his property has been listed and returned to the auditor. 505.

A husband who accepts a sum of money from his wife with the understanding that she may take a divorce at her pleasure, has no cause of action against those carrying out the agreement. 469.

ADMINISTRATOR—

The appointment of an administrator or executor does not under the law of Ohio suspend the operation of the statute of limitations. 518.

The relation of executor or administrator to the estate does not create a continuing and subsisting trust under Section 4974. 518.

Can not apply assets of the es-

tate to the payment of his claim prior to its allowance by the probate court. 518.

Error does not lie to order removing an administrator under Section 6017. 549.

Error may be prosecuted to an order denying the right of certain persons to administer the estate. 549.

Where a suit for wrongful injuries was pending at the time of the death of the intestate, it is necessary that the administrator, if the action is revived by him, file an amended or supplemental petition, setting forth the time of death and whether death was the result of the injuries alleged by the original plaintiff. 559.

An action in replevin will not lie against, for recovery of mortgaged goods in possession of the mortgagor, although the condition of the mortgage was broken at the time of his death. 563.

Is a merely nominal party to a suit for wrongful death, and a general denial does not traverse his representative capacity. 81.

Objection to an administrator bringing suit for wrongful death of the intestate must be taken by demurrer as for want of legal capacity to sue, or by special denial. 81.

Where appointment of, is not completed until after action for wrongful death has been brought, and two years has elapsed since the accident occurred, the action can not be maintained and the cause is abated. 45.

Authority of administrator does not relate back in the matter of a claim for wrongful death, but begins with his appointment. 45.

Failure of, to give bond renders appointment invalid and action for wrongful death nugatory. 45.

Should inventory a note against a son of the decedent where the will directs that, if the note is not paid at the death of the testator, the amount thereof shall be charged against the son and taken out of his distributive share. 190.

ADVANCEMENTS—

Nature of; not a loan or debt, and create no liability except on distribution; quit-claim of interest of heir in real estate carries rights growing out of unequal advancements. 125.

The operation of the statute as to, can only apply where the decedent died intestate as to his property. 190.

AFFIDAVIT—

Charging the keeping of a place open on Sunday where intoxicating liquors are on other days of the week exposed for sale and sold, is sufficient, when. 429.

Charging the keeping of a place where intoxicating liquors are sold, is not bad for duplicity because it alleges several distinct offenses of the same kind requiring punishments of like nature; election as to counts. 241.

Sufficiency of affidavit accompanying requisition papers. 265.

AGENCY—

A clerk of court in undertaking to inform a party as to when his case is coming on for determination becomes the agent of such party. 324.

Inasmuch as there are crimes in which proof of agency is necessary to conviction, a court will not hold that a witness has been legally committed for refusing to answer as to whether he was the agent of a certain party, where the record fails to disclose the nature of the action. 641.

AMENDMENT—

Of petition becomes necessary, where a plaintiff suing for damages for wrongful injuries dies before the action is determined and it is revived by his administrator. 559.

ANTE-NUPTIAL AGREEMENT—

What must be pleaded and proved with reference to, in order to bar a widow of dower. 33.

APPEAL—

Where made by a municipal employe to a civil service commis-

sion; the authority of which the director of public safety refuses to recognize, should be to a tribunal having jurisdiction to decree and enforce a reinstatement. 1.

Last answer day, where the appeal is from a justice of the peace to the common pleas. 251.

APPEARANCE—

The filing of a motion to discharge an attachment does not constitute an appearance, when. 345.

ASSESSMENT—

For a street improvement; can not be enjoined on the ground of failure to file specifications for repair of street, where the city does the work itself and not by contract; repairing a street by sections does not invalidate an assessment for the whole. 368.

Failure of an improvement to enhance the market value of abutting property not sufficient to invalidate the assessment on the ground of lack of benefits. 368.

An assessment for a street improvement includes all items entering into the cost of the improvement, including curbing. 438.

Proportionate share of a street railway company for an assessment for improving a street in which its tracks are laid. 438.

A street assessment can not be successfully resisted by the grantee of a petitioner for the improvement, when; nor by a grantor to whom the property is subsequently reconveyed. 216.

Of public school property for street improvement. 122.

ASSIGNMENT—

Legal services form a valid consideration for an interest in litigation, and such interest may be assigned; the right thus assigned is not enforceable in an action at law, but in a court of equity upon a showing of notice of such interest to the defendant. 366.

A policy of life insurance is not assignable by a married woman under the first clause of Section

3629; but an assignment to a wife and her assigns, with a reversion back to her husband in case of her prior death, is valid under the second clause or exception of the statute. 646.

ATTACHMENT—

Where money voluntarily placed on deposit as bail under a charge in the police court is attached for debt, the petition is defective if it does not allege that the deposit was made in fraud of creditors and that the defendant was a debtor to plaintiff at the time the deposit was made. 206.

Where on the day the attachment was levied the debtor was not in a position to enforce a repayment of the money, an attaching creditor does not obtain a valid lien. 206.

A motion to discharge on the ground that the affidavit is false does not confer jurisdiction, and a dismissal of the suit, as well as of the attachment, may properly be entered. 345.

Physician's services constitute "necessaries" and attachment will lie. 105.

Will lie against a widower who has no family except a stepdaughter who does not live with him, when. 105.

ATTORNEY AND CLIENT—

Legal services constitute a valid consideration for an interest in the judgment obtained, and such judgment may be assigned, and is not champertous; judgment debtor must have notice of assignment; rights under the assignment enforced, how. 366.

Where an attorney enters into a contract with county commissioners for the collection of taxes by suit on property theretofore treated as exempt, and it is agreed that similar suits shall follow the result in a test case, the attorney is entitled to his commission on the amounts recovered in all the cases. 505.

Misbehavior by an attorney in the presence of the court gives to

the court an inherent right to try him, notwithstanding the filing of affidavits of prejudice. 657.

An attorney who disregards an order of court on the ground that it is not technically correct in its terms is guilty of contempt. 657.

While a court has no power to dismiss a lawyer from his client's service, it is competent where an attorney abandons his client in the midst of a criminal trial to appoint other counsel to take his place and protect the interests of the defendant. 657.

The abandonment of a defendant in a criminal trial by his attorney because the fee agreed upon has not been paid, constitutes a contempt of court, where the work of the court is thereby interfered with. 657.

A proposal and acceptance constitute the relation of attorney and client. 657.

AUDITOR—

Requirement of certificate of county auditor as to availability of funds before contracts are entered into by public officials. 303.

BAIL—

Money deposited as, is not subject to attachment, unless. 206.

Authority to suspend sentence in order to give opportunity to file a petition in error does not authorize admission to bail pending the hearing on error. 622.

BALLOTS—

Irregularity in the form of, does not invalidate an election, where the contestors sanctioned the ballot used by participating in the election; distinction between ballot and vote. 373.

BENEFITS—

A street assessment can not be successfully resisted on the ground of lack of benefits, based upon the fact that the traffic is too heavy for the character of the improvement made. 216.

BILL OF EXCEPTIONS—

Must contain all the evidence on

review from a prosecution before a mayor to secure a consideration of the weight of the evidence. 429.

In a mandamus proceeding to compel a judge to sign a bill, an answer to the effect that the bill presented is not a true bill is not sufficient, but there must also be shown a willingness and effort on the part of the judge to perfect the bill. 283.

BOARD OF EDUCATION—

Entitled to the custody of school sinking funds, but not of their management and control. 401.

BONDS, NEGOTIABLE—

Where an attempt has been made in good faith to sell duly authorized bonds at public sale, a failure to sell does not work a rescission of all the steps that have preceded, and the subsequent sale of the bonds at private sale is valid. 609.

Not incumbent upon a municipality in refunding street improvement bonds to account to the abutting property owners for the profit resulting therefrom. 261.

BONDS, SURETY—

Of a guardian; failure of the guardian to respond in an action to review his account is a breach of the condition of the bond. 88.

BRIBERY—

A charge that two councilmen have accepted bribes and fifteen others have been influenced in their voting by a party who contributed to their individual campaign funds, constitutes a charge of misconduct in office. 57.

BRIDGES—

While it is the duty of county commissioners to keep in reasonably safe condition, they are not justified in ignoring statutory provisions as to repair or new construction. 303.

Recovery of money by county paid on illegal bridge contracts. 303.

BUILDING INSPECTOR—

An order by, that a building be

razed on account of its unsafe condition is not an eviction of the tenant by title paramount, and creates no liability against the landlord, unless. 393.

BURIAL—

Right of decedent or relative to designate place of. 405.

BURDEN OF PROOF—

In an action by a sister to set aside for want of consideration, fraud and breach of confidential relations, a paper writing wherein she agrees to convey certain property to her brother, the burden of proof is upon the brother. 225.

Is upon a policyholder in a fire insurance company to show compliance with a condition requiring that he submit to an examination under oath concerning the loss upon which he has brought suit. 246.

In habeas corpus for the release of a witness committed for contempt in refusing to answer, the burden is on the sheriff to show that the commitment has been legally made. 641.

Is upon a surety, claiming release from a note by reason of an extension, to show that the extension was granted upon a definite agreement based upon a sufficient consideration. 646.

Is upon an abutting owner to show that the assessment materially exceeds the benefits, when attempting to enjoin an assessment on that ground. 368.

CAPACITY TO SUE—

Objection to an administrator bringing suit for the wrongful death of the intestate must be taken by demurrer as for want of legal capacity to sue, or by special denial. 81.

CAR SERVICE—

Reasonable rates relating to, are legal and enforceable. 412.

The switching of cars arriving over a connecting line may be compelled, when. 412.

CAVEAT EMPTOR—

Doctrine of, applies to one leas-

ing a building which is unsafe. 393.

CHARGE OF COURT—

A special charge that "if plaintiff by her own testimony in support of her cause of action raises a presumption of contributory negligence, the burden rests upon her to remove that presumption," was properly refused where there was no testimony implying negligence on her part. 8.

A charge as to facts excusing contributory negligence, although in the opinion of the court unnecessary, is not to the prejudice of the defendant if no contributory negligence existed. 8.

With reference to measure of damages, where there has been proof introduced as to the distressing character of injuries resulting in the death for which the suit has been brought. 81.

In reviewing a charge, the word "if" will not be read as equivalent to "unless," where to do so would render the statement contradictory of a preceding paragraph. 581.

In view of what had been said previously in the charge, it was not error in this case to add: "If, on the other hand, you should find certain conditions existed (enumerating them), then it is for you to say whether those conditions excused any negligence there might have been on his part." 581.

It would be error to instruct a jury that a passenger elevator is a place of danger. 581.

A special charge is properly refused, which holds the plaintiff to proper care and caution, without defining what would constitute proper care and caution under the circumstances. 581.

The jury should be instructed that if they find the hypothesis upon which the opinions of expert witnesses are based is not in accordance with the facts, the opinions of the experts should be treated as of no value. 676.

On abstract propositions of law open to technical objection but not prejudicial. 633.

As to highest degree of care on the part of a street railway company; pecuniary injury resulting from loss of time and diminished earning capacity. 633.

CINCINNATI SOUTHERN RAILWAY—

The operation of, by a lessee company, in connection with such other lines as the lessee company may control, is in no sense a combination of the city of Cincinnati with such other lines in violation of the Constitution. 109.

Lessee company in nowise limited as to the character of business it may carry on or in the connections which it may make with other roads. 109.

CITY SOLICITOR—

Authorized under Section 1777 to sue to enjoin a traction company from refusing to give or receive transfers in accordance with the grant to the original company. 489.

CIVIL SERVICE—

Where the authority of a civil service commission is disputed by a director of public safety, application should be made to a tribunal having jurisdiction to decree and enforce the order of the commission. 1.

A suspension of a municipal employe because of failure to appropriate sufficient funds to pay for his services is not wrongful, and neither a civil service act nor a contract of employment could afford him protection. 1.

CLAIM AGENT—

Of a street railway company can be compelled, in a suit growing out of an accident on the line, to produce the report made by the conductor and motorman with reference to said accident. 93.

CLASSIFICATION—

No authority for the classification of passengers within the limits of a municipality by the circumstances of their happening to be on an *intra* or *extra* urban car. 489.

Of railways as between steam and other roads; how determined. 561.

CLERK OF COURT—

In undertaking to keep a party informed as to when a case is coming on for determination, becomes the agent of such party. 321.

CLEVELAND FEDERAL PLAN—

Power of the director of charities and correction to discharge prisoners from the work house, under; regulations necessary to make valid. 65.

CONSIDERATION—

For a transfer from one line of street cars to another. 489.

Inadequacy of, as an element upon which to base the reversal of a decree for specific performance. 501.

To secure a divorce. 469.

CONSENT—

Of the accused does not confer upon a justice of the peace jurisdiction to conduct a criminal trial outside of the township in which he resides and was elected. 555.

CONSPIRACY—

Inasmuch as the injury done and not the conspiracy itself is the gravamen in an action for conspiracy, a verdict may be returned against any one or more of the defendants. 469.

CONTEMPT—

A witness arrested for refusal to answer questions during the taking of his deposition must be released, where the questions call for hearsay testimony. 93.

Misbehavior of attorney in the presence of the court; inherent right of court to try him for such offense, notwithstanding the filing of affidavits of prejudice; abandonment of a criminal case in the midst of trial because the defendant has failed to pay the fee agreed upon, constitutes a contempt of court when such action interferes with the work of the court. 657.

An attorney who disregards an order of court upon the ground that it was not technically correct in its terms, is guilty of contempt. 657.

The publication of charges to the effect that certain indictments were procured through fraud, blackmail and bribery, where made without evidence in support thereof, is contempt of court, for which summary punishment may be visited on the guilty parties. 593.

The grand jury is a component part of the court, and charges affecting it affect the court. 593.

CONTRACTOR—

Liability for an accident at a pony track, operated at a public resort, can not be shifted by the owner to an independent contractor. 81.

Rights of sub-contractors are fixed and determined at the death of the principal contractor, unless the personal representative undertakes to complete the work. 150.

Creditors of a head contractor are entitled to priority over a sub-contractor, where they secure their claims prior to the giving of notice by the sub-contractor to the owner. 150.

CONTRACT—

Employees of a municipality can not rest right of recovery for services upon contract. 1.

Marriage contract which bars a widow of dower; facts which must be pleaded. 33.

Between county officers and tax inquisitors; stipulations they may contain without being rendered illegal. 153.

Power of insane asylum trustees, under authority delegated by the Legislature, to contract with railroad companies with reference to a track across the asylum lands, is *functus officio* when once exercised and contract can not be afterward modified. 234.

In the making of a contract by a sister with her brother for the conveyance to him of certain land, the burden of proof is upon the

brother to show that the transaction was fair and equitable, and under the circumstances of this case the agreement will be set aside because of undue influence. 225.

With a board of health and not in writing, for necessities to be provided for a family quarantined on account of small-pox. 398.

For the construction of county bridges; invalidity of, for failure to comply with statutory provisions; recovery of money paid on invalid county contract. 303.

CONSTITUTIONAL LAW—

Sections 1343a and 1343b, providing for the appointment in certain counties of persons to discover property omitted from the tax duplicate, are unconstitutional for lack of uniformity of operation. 153.

The limitation found in Section 1343-4, upon the operation of Sections 1343-1, 1343-2 and 1343-3 should be disregarded and these statutes upheld. 153.

The provision of 97 O. L., 436, which prohibits hunting or shooting or having in the open air for such purpose any implements for hunting or shooting on any Sunday, does not abridge the right to keep and bear arms, and is constitutional. 13.

The constitutional inhibition against the increase or decrease of the salary of an officer during his existing term does not render it incompetent for him to accept compensation, fixed by the General Assembly after he entered upon the discharge of the duties of his office and before the expiration of his term, where no compensation was theretofore provided; and where a statute fixing salaries is declared unconstitutional during an existing term of office, the officer is left in the position of one for whom no compensation has been provided, and may accept compensation under a new statute notwithstanding it is higher than that fixed by the unconstitutional statute. 544.

CORPSE—

Right of burial should be determined primarily by regard for the interests of the public and the feelings of those entitled to be heard; the paramount right is in a surviving husband or widow; one can not dispose of his body by will; wishes of decedent should be considered, but are not controlling; wishes of surviving widow take precedence over those of deceased husband, and especially so, when. 405.

CORPORATIONS—

The business of defending physicians against civil suits for malpractice is a professional business, and within the inhibition of Section 3225, forbidding the carrying on of a professional business by a corporation. 185.

COURTS—

See Judges.

A court has power to try an attorney who misbehaves in the presence of the court, notwithstanding the filing of affidavits of prejudice. 657.

A court has no power to dismiss an attorney from his client's service, but where an attorney abandons his client in the midst of a criminal trial, the court may appoint other counsel to take his place. 657.

A court may punish summarily the parties guilty of publishing untrue charges of corruption against the grand jury. 593.

Where the Supreme Court expresses no opinion on questions raised, and the same questions are again presented at the re-trial of the case, they may be regarded as properly determined at the first trial. 581.

The power conferred upon the common pleas court to suspend the execution of sentence in order to give time for filing a petition in error does not authorize the admission of the one convicted to bail pending the hearing on error. 622.

Probate courts are courts of rec-

ord, having general jurisdiction within the sphere of the subject matters assigned to them by the Legislature. 549.

The orders and decrees of the probate court import absolute verity and require no affirmative evidence to indicate jurisdiction within the sphere of subjects assigned to these courts. 549.

Facts which are not jurisdictional to the probate court. 549.

Judicial officers, such as a common pleas judge, can not be held in a civil case for any judicial action, finding, judgment or decree with reference to a matter within the jurisdiction of the court; the jurisdiction here meant is jurisdiction as a matter of law, and not as determined by such judge from the facts; this rule is alike applicable whether the act complained of be honestly, negligently or corruptly done. 466.

A reviewing court will not disturb a decree for specific performance, except for error or misapprehension. 501.

Power of police court over sentence after term; suspension of sentence; revocation of suspension. 533.

The probate court is clothed with final jurisdiction in a proceeding to contest an election under the Brannock law without the intervention of freeholders. 129.

COUNCIL—

Jurisdiction of, to order a street improvement was based, under 90 O. L., 156, in the petition therefor of one-half or more of the frontage. 216.

Loses jurisdiction to order a Beal law election when names are withdrawn from the petition to a number less than the requisite forty per cent. before action is taken on the petition. 17.

Statute under which prosecution of councilmen for misconduct in office should proceed; Section 225 of the Municipal Code not applicable; compelling the production of books and papers; incriminat-

ing evidence; bribery; misfeasance. 57.

A charge which constitutes misconduct of councilmen in office. 57.

Obvious disadvantage of trial of councilmen before their fellow-members. 57.

COUNTIES—

A statute making an exception of certain counties should be distinguished from one which limits the operation of the law throughout the state. 505.

COUNTY AUDITOR—

Is not bound to assume that the returns as made for taxation are false. 153.

COUNTY COMMISSIONERS—

Contract by, with an attorney for the bringing of suits for the collection of taxes on property theretofore treated as exempt; where it is agreed that similar cases shall follow the result in a test case, the attorney is entitled to his commission on all the cases. 505.

Discretion of, as to the fees to be paid for the collection of taxes by suit will not be interfered with, when. 505.

An allowance by, of \$1,250 per annum to a prosecuting attorney under Section 845 will be upheld, when. 505.

The restrictive clause in Section 2834b does not apply to, and the act is therefore not invalid as to them whatever may be the effect of the restriction as to officials to whom it does apply. 303.

While it is the duty of, to keep county bridges in reasonably safe condition, they are not justified in ignoring statutory provisions as to repair or new construction. 303.

The allowance and order for payment of claims by, not *res judicata* when the claims were invalid by reason of non-compliance with statutory requirements. 303.

County commissioners whose salaries were fixed by statute declared unconstitutional during

their term of office can not be enjoined from receiving pay under the act of April 21, 1904, notwithstanding the compensation there fixed is higher than that provided under the unconstitutional statute. 544.

COVENANTS—

Of special warranty in a deed conveying only "right, title and interest" can not be enlarged, but is limited to the estate granted; unpaid taxes not a breach of such warranty. 41.

There is implied covenant on the part of the lessor to deliver the premises to the lessee at the moment he is entitled to take possession, and a breach thereof releases the lessee from the obligation to take the premises. 50.

Against the manufacture or sale of intoxicating liquor run with the land, and are binding upon subsequent grantees whether inserted in their deeds or not; and the fact that the original grantor owned only one-fourth interest in the land and was a tenant in common with his grantee, is immaterial. 141.

A covenant against the sale of intoxicating liquor or its manufacture on the land sold may be enforced by injunction, unless the plaintiff has been deprived of his right by his own conduct or laches. 141.

CRIMINAL LAW—

The abandonment of a client, after his case has been called for trial, because the fee agreed upon has not been paid, constitutes a contempt of court, where the work of the court is thereby interfered with. 657.

The right of a defendant in a criminal case to a proper defense must be protected by the court. 657.

The authority conferred on a common pleas judge to suspend sentence for a reasonable time within which to file a petition in error, does not authorize admis-

sion to bail pending the hearing on error. 622.

Proof of a single sale is sufficient to establish the charge that the defendant kept a place where intoxicating liquors are sold. 241.

Not error for a mayor to overrule a motion for a change of venue in a prosecution for keeping a place where intoxicating liquors are sold, when. 241.

Affidavit charging the keeping of a place where intoxicating liquors are sold, not bad for duplicity because it charges several distinct offenses of the same kind and calling for the same punishments. 241.

The *per diem*, which the prosecution has agreed to pay its witnesses in addition to the amount which they will receive from the state, is a proper subject of cross-examination. 241.

Consent of the accused does not confer upon a justice of the peace jurisdiction to conduct a criminal trial outside of the township in which he resides and was elected. 555.

In an application for extradition the facts which constitute the crime must be set out, unless the application is based upon an indictment by a grand jury, and this requirement is not satisfied by an affidavit charging the crime in the language of the statute. 485.

The revision, suspension and revocation of suspension of sentence after term. 533.

DAMAGES—

In an action for damages on account of injuries received, testimony as to the irregular life of the plaintiff, offered for the purpose of showing probable impairment of health prior to the accident, is inadmissible. 8.

For an injury due to the fault of another can not be reduced by the amount of sick benefits paid to the one injured; but where sick benefits are waived in order to receive full wages, the equivalent of

such wages can not be again awarded by the jury. 30.

Character of charge to the jury necessary in a suit for damages on account of death from injuries, where there has been proof introduced as to the distressing character of the injuries. 81.

A municipality liable in, for an assault by the custodian of a public park committed while acting in the line of duty. 480.

DEED—

Covenant against the acts of the grantor is limited to the estate granted; unpaid taxes which were a lien at the time of the purchase can not be recovered on the ground of breach of such a covenant. 41.

Quit-claim deed covering all the interest of an heir in the real estate of his ancestor carries such additional interest as the grantor may have by reason of advancements to other heirs. 125.

Enforcement of a covenant against the manufacture and sale of intoxicating liquors on the land conveyed. 141.

Delivery of, does not pass a title *eo instant* unless the grantee is in a position to legally accept the deed at the time it came into his manual possession. 225.

Where quit-claim deeds are given for the sole purpose of effecting a partition, an exception is made to the general rule as to after-acquired title in real estate, and such deeds will be treated as containing an implied covenant that the grantor owns the premises conveyed. 269.

The fact that the plaintiff in an action to quiet title obtained a quit-claim deed from one of the defendants, will not be held to raise a presumption or acknowledgment of co-tenancy. 269.

DELEGATION OF DUTIES—

By the Legislature empowering trustees of an insane asylum to authorize a railroad company to cross the asylum lands, becomes

functus officio when once exercised. 234.

DEMURRAGE—

Legality of reasonable demurrage charges. 412.

DEVISE—

Effect of a quit-claim deed upon the interest of the heir growing out of advancements to other heirs. 125.

Where the will provides that, if a note against a son of the testator is not paid at the testator's death, it shall be charged against the son, and taken out of his distributive share, the note should be appraised and inventoried by the executor. 190.

Where the will directs that certain land shall be sold, and the proceeds distributed as therein directed, the persons to whom the proceeds are to be distributed acquire no title under the will by electing to take the land, nor can such an election defeat the right of the widow to her distributive share of such proceeds. 190.

DISMISSAL—

Where it appears that the facts alleged in an affidavit of attachment are untrue, a dismissal of the suit as well as the attachment may properly be entered. 345.

DISTRIBUTION—

Of a fund due a deceased head contractor; liens of sub-contractors and of other contractors. 150.

DIRECTOR—

Power of Director of Charities and Correction under the "Cleveland federal plan" to discharge a prisoner from the work house. 65.

Failure of the mayor to endorse his approval of the discharge may be cured by a subsequent endorsement, when. 65.

Sentences imposed in state cases, as distinguished from those imposed by the municipal court, and power of director with reference thereto. 65.

DISCRETION—

Of a probate judge in the matter

of the appointment of jail matrons can not be controlled by mandamus, when. 1.

Of judge in revising, suspending or revoking suspension of sentence after term. 533.

The discretion lodged with county commissioners with reference to the fees to be paid attorneys for the collection of taxes by suit will not be interfered with, when. 505.

DIVORCE—

Conspiracy to secure, alleged; injury to plaintiff resulting from; discharge of one defendant does not discharge all; what constitutes a collusive agreement to secure a divorce; mouth of injured party closed, when. 469.

DOWER—

Facts which must be pleaded and proved in order to bar a widow of dower by reason of a marriage contract or ante-nuptial agreement. 83.

A widow who does not elect to take under the will is entitled to dower in all the lands of which her husband died seized; where there is a direction that certain lands be sold and the proceeds distributed to certain persons, such persons do not acquire title by electing to take the land, and the widow's right to her share of the proceeds from the land can not be defeated by such election. 190.

Owner of unassigned dower can not bind the property by her signature for a street improvement. 216.

Method of computation of dower interest of widow in mortgaged estate, where the proceeds of sale exceed the mortgages. 209.

EASEMENT—

Of abutting lot owners in street. 257.

ELECTIONS (Political)—

See Ballots.

Jurisdiction to order a Beal law election by council is lost, where names are withdrawn from the petition to a number less than the

requisite forty per cent. before action on the petition taken. 17.

Contest of an election under the Brannock local option law; petition contesting election must be stricken from the files where there has been a failure to issue summons upon the mayor for more than twenty days after the election. 117.

A probate judge is clothed with final jurisdiction in a contest of an election under the Brannock liquor law, without the intervention of freeholders as provided by law for the contest of an election of a justice of the peace. 129.

A petition for an election under the Brannock law is a public document which any citizen or petitioner of the district has a right to inspect. 179.

Rules which govern the formality and regularity of elections for restriction of the sale of liquor. 329.

The designation in an order for an election under the Brannock law of a voting place fifteen feet over the boundary line of the proposed district does not invalidate the election, when. 329.

Time within which an election must be held under the Brannock law is mandatory. 353.

A petition for an election under the Brannock law may be withdrawn for the purpose of changing the boundaries of the proposed district, and the use of the old sheets in re-filing is competent, when. 356.

Orders made by a judge with reference to a Brannock law election are ministerial, and not orders of court. 358.

A petition for an election under the Brannock law, which is legally insufficient, does not take precedence over a legal petition subsequently filed and covering overlapping territory, when. 358.

Irregularity in the publication of notice of a Beal law election without significance, when. 373.

Irregularity in the form of bal-

lot; form used sanctioned by contestants by participating in the election. 373.

One whose mental condition is such that a court would have no hesitancy in committing him to an asylum or appointing a guardian for him, is well within the class who are prohibited from exercising the elective franchise by the Constitution. 373.

A petition for an election under the Beal law is sufficient as to number of signers, when. 373.

Allegations of petition to contest validity of Beal law election; evidence can be introduced only as to irregularities specified in the petition. 373.

The casting of a ballot not properly marked is not the casting of a vote. 373.

Where the result of an election turns on the vote of an insane man, the court will declare that there is no majority and no election under the statute. 373.

Irregularity of election officer in going out to the street to receive the ballot of a voter who was not able to leave his carriage. 373.

Under the Beal law; liquor sellers not entitled to be made parties to suit to contest election; voters at such an election must vote in their own precincts; voting place of infirm inmates is the infirmary precinct; carbon ballots and other frauds at the polls. 453.

ELECTIONS (Between Rights)—

Where the will directs that certain land be sold and the proceeds distributed among certain persons, no title is acquired by such persons electing to take the land, nor can such an election defeat the widow's right to her distributive share of the proceeds. 190.

There is no provision of statute whereby a surviving wife may elect to take under the law; a provision in the will requiring her to elect abrogates none of her rights under the law; her dower covers all lands of which her husband died seized. 190.

ELEVATOR—

To give a special charge to the effect that a passenger elevator is a place of danger would be error. 581.

It is not error to leave it to the jury to say whether the circumstances were such as to lull a plaintiff, who stepped into an open elevator shaft, into a sense of security in the belief that the cab was there to receive him. 581.

EMERGENCY—

The ignoring of statutory provisions by public officials not justified by emergency. 303.

EQUITY—

Equitable rights will not be denied to a defendant who has failed to pray for the equitable protection of the court in a suit for recovery of money paid out of the county treasury under an illegal contract for the construction of bridges. 303.

ERROR—

A reviewing court will not say as a matter of law that because others saw a locomotive backing toward a crossing on a dark night without any headlight, that one who was standing on the crossing and did not see it was guilty of contributory negligence. 30.

Not error in a suit for death from injuries to admit proof as to the distressing character of the injuries, when. 81.

It is not error to permit the introduction of parol testimony to explain the words "unless otherwise satisfied" found in the mortgage. 145.

Under the circumstances of this case, to take a case from the jury involving the question of liability of a municipal corporation for an injury sustained to one upon a public way which was out of repair. 362.

A court is not bound to consider the weight of the evidence on review of a prosecution before a mayor where the bill of exceptions does not show that it contains all the evidence. 429.

A decree involving specific performance will not be reversed except for error or misapprehension. 501.

A party is not prejudiced by two decrees to sell, one ordering an appraisalment, and the other an upset price, especially if the sale yields more than two-thirds of the appraisalment and more than the upset price. 549.

Although error may be prosecuted to an order denying the right of certain persons to administer an estate, under Section 6005, this can not be done on an order removing an administrator under Section 6017. 549.

Technical objection to charge of court on an abstract proposition of law which was not prejudicial not ground for reversal. 633.

The dismissal of one of two parties from a case is not ground for complaint, where their liability, if any, was separate as well as joint, as in the case of collision between a street car and wagon, causing injury to a passenger. 633.

It is error to instruct the jury that the opinions of experts are of little value, if they find that the hypothesis upon which the opinions were based is untrue; the proper instruction is that such opinions under such circumstances are of no value. 676.

ESTOPPEL—

Arises against one seeking to enforce a covenant against the sale or manufacture of intoxicating liquor on the land conveyed, where he has encouraged a breach of the covenant. 141.

Does not lie against a gas company defending against an exaction in the form of payment to a municipality for the privilege of using its streets, to which it has submitted for a period of years. 293.

EVIDENCE—

The rule permitting an attack upon the credibility of a witness in a civil case is confined to proving reputation for want of ver-

acity, and does not permit of proof directed against the moral character of the witness. 8.

In support of a claim for injuries; collateral proof as to physical and moral health of plaintiff. 8.

Privilege of witness with reference to production of books and papers, and evidence that is incriminating. 57.

Proof of the distressing character of the injuries is competent in a suit for damages on account of such injuries, when. 81.

Reports made by conductors and motormen of accidents occurring along the line, made to the claim agent of a street railway company, are not privileged and must be produced under a *duces tecum* issued in an action growing out of such an accident. 93.

Where evidence is called for of a hearsay character, a witness can not be held in contempt for refusal to answer. 93.

The introduction of extraneous evidence to make clear the language used by a testator in his will does not permit the reading into the will of a provision as to which it is silent, or the adding thereto of a substantial request. 280.

That a building which had been ordered razed, because a menace to the public, could have been rendered safe by shoring it up is incompetent in a suit by the lessee, when. 393.

Weight of, will not be considered where on review of a prosecution before a mayor the bill of exceptions does not show that it contains all the evidence. 429.

In a suit to contest a Beal law election, will be restricted to the irregularities specified in the petition. 373.

As to intoxication of motorman of car in the collision rendered competent by averments of petition that the motorman negligently, carelessly and unskillfully per-

mitted his car to run into the wagon. 633.

A witness who refuses to answer on the ground that the disclosures will incriminate him, is the sole judge as to whether or not such is the fact. 641.

Latitude with reference to hypothetical questions; facts which may be assumed; exaggerations of facts and facts which are not supported by any evidence. 676.

EXCEPTIONS—

In a prosecution for keeping a saloon open on Sunday, the exception found in the statute need not be pleaded. 429.

A statute making an exception of certain counties should be distinguished from one which limits the operation of the law throughout the state. 505.

EXECUTOR—

See Administrator.

EXEMPTIONS—

As applied to a widower having no family except a stepdaughter, who does not live with him, but toward whose support he contributes something. 105.

The statutory exemptions which have been made relative to the compensation of prosecuting attorneys in different counties are constitutional. 505.

EXCLUSIVE PRIVILEGE—

The clothing of a tax inquisitor with, does not render his contract with the county illegal. 153.

EXTRADITION—

Is warranted only when the facts which constitute the crime are made to appear, unless the application is based upon an indictment by a grand jury; this requirement is not satisfied by an affidavit charging the offense in the language of the statute, but the facts necessary to make out the crime must be charged. 485.

Power of the courts to interfere with. 485.

FAMILY—

The special exemption to one with a family is not available to one who has no other family than a stepdaughter who lives with her maternal grandmother. 105.

FAMILY AGREEMENTS—

It must be assumed that the father of children to whom property was conveyed intended to do just what he did do, when with deliberation and in legal form he made a conveyance to one of his daughters; and representations to her that such conveyance was a departure from the understood family agreement, whereby she was persuaded to convey the property to a brother, amounts to undue influence. 225.

FEES—

Collected from defendants convicted before a mayor are payable into the municipal treasury; mayor not authorized to collect, unless; fees collected by a mayor can be recovered by the municipality, when. 99.

FORECLOSURE—

Where equitable foreclosure was sought in partition proceedings to which the mortgagor and mortgagee were parties but a surety on one of the notes was not. 145.

FRAUD—

Alleged conspiracy to secure a divorce; injury resulting therefrom to the innocent party; what constitutes a collusive agreement to secure a divorce; discharge of one defendant to an action for conspiracy to secure a divorce does not discharge all. 469.

GAS COMPANY—

An exaction by a municipality from, whether for revenue or for other purposes, is void; estoppel does not apply to a gas company making the defense of invalidity of the provision after being submitted thereto for a period of years. 293.

GAME LAWS—

It is within the power of the

state to provide for the protection and propagation of game by forbidding hunting or having in the open air any instruments for hunting or shooting on any Sunday. 13.

GOVERNOR—

May sign requisition papers in blank, provided that he personally directs that the warrant issue, and his direction that the warrant issue may be given by telephone; regulations provided in Section 95. 265.

GRANTOR AND GRANTEE—

A covenant of special warranty against the acts of the grantor contained in a deed conveying only the "right, title and interest" of the grantor, can not enlarge, but is limited to the estate granted. 41.

GRAND JURY—

Baseless charges published of and concerning a grand jury constitute contempt of court. 593.

Charges against a grand jury do not become privileged by reason of the fact that they refer to past acts as distinguished from those which are prospective and concerning which the action of the jury might thereby be changed. 593.

GUARDIAN—

Becomes a non-resident after approval of account; upon allegations of fraud or mistake his successor or wards may go into the common pleas, summon the sureties on the bond and proceed with the accounting and for recovery upon the bond in that action if anything is found due. 88.

Failure of a guardian to respond in an action to review his account, is a breach of the condition of his bond. 88.

HABEAS CORPUS—

A writ of, should issue upon the application of one for whom a warrant of extradition has issued, where the facts which constitute the crime are not made to appear, unless the application is based

upon an indictment by a grand jury. 485.

In habeas corpus for the release of a witness who had refused to testify on the ground that the answer sought would incriminate him, the burden is on the sheriff to show that the commitment has been legally made. 641.

HOMESTEAD—

A stepchild which has not been declared to be the child of its stepfather is not the child of such stepfather within the meaning of the homestead exemption law. 105.

HUSBAND AND WIFE—

Where a woman is the principal debtor, notice by the surety to her husband does not satisfy the requirement of Section 5833. 145.

Method of computing dower interest of wife where there are mortgage incumbrances and the proceeds of sale exceed the mortgages; wife not subrogated to mortgage lien discharged in part with her separate means. 209.

Right of surviving wife to fix place of burial of deceased husband contrary to his wishes will be recognized, when. 405.

A husband who by a written agreement receives a sum of money from his wife with the understanding that she may take a divorce at her pleasure, can not thereafter maintain an action against those whom he charges with conspiring with his wife to secure the divorce. 469.

What constitutes a collusive agreement between, for the securing of a divorce. 469.

Old note of deceased husband held by his widow and partially paid by her as his administratrix. 518.

The common law rule preventing the application of the statute of limitations to claims existing in favor of the wife against her husband during coverture has been abrogated in Ohio by statute. 518.

A policy of life insurance is not assignable by a married woman under the first clause of Section 3629; but an assignment to a wife and her assigns, with a reversion back to the husband in case of her prior death, is valid under the second clause or exception of the statute. 646.

HYPOTHETICAL QUESTIONS—

Latitude must be allowed in putting a hypothetical question; not improper because it includes only a part of the facts in the case; counsel may assume the facts in accordance with his theory of them, when; material exaggerations of facts and facts not supported by any testimony are improper. 676.

A jury should be instructed that if they find the hypothesis upon which the opinions of expert witnesses are based is not in accordance with the facts, the opinions should be treated as of no value. 676.

IMPRISONMENT—

Is not a part of the penalty, where it is imposed only to enforce payment of a fine and costs under a police regulation. 429.

INFANTS—

Where injured in service of the defendant, the rule requiring plaintiff to show that he was without fault does not apply, when. 448.

After arrival at full age may have a review of guardian's accounts and notify the sureties to take part. 88.

INJUNCTION—

Will lie for the removal of a steam railway track unlawfully in the street upon the suit of one specially injured thereby. 109.

Will lie to enforce a covenant against the manufacture or sale of liquor on the land sold, unless. 141.

Mandatory injunction is an appropriate remedy to enforce the right of inspection of a petition

filed with the mayor for a Brannock law election. 179.

Railway may be compelled by mandatory injunction to switch cars arriving by a connecting line, when. 412.

Will lie upon petition of a city solicitor to compel the observance of the condition of a street railway grant with reference to the issue and acceptance of transfers. 489.

A suit by a tax-payer to enjoin the sale of water works bonds must be regarded, under the circumstances of this case, as brought in the interest of a competing water company, and gives the plaintiff no standing in court. 609.

INSANITY—

One whose mental condition is such that a court would experience no hesitancy in committing him to an insane asylum, or in appointing a guardian for him, is within the class who are prohibited from voting under the Constitution. 373.

Delusions as to property values as an element upon which to base a reversal of a decree for specific performance of a contract for the sale of property. 501.

INSURANCE—

A corporation organized for the purpose of defending physicians against civil suits for malpractice is not an insurance, but a professional business. 185.

INSURANCE, FIRE—

Where the right to examine the insured under oath is provided for in a policy, compliance therewith on the part of the policyholder constitutes a condition precedent to an action on the policy. 246.

Where the answer denies compliance with a request for an examination of the insured under oath, the burden of proof is on the policyholder to show compliance. 246.

Notice of intention of company to have an examination is suffi-

cient when it states the time and place of the examination and the name of the person who is to conduct it. 246.

A policyholder who alleges that he has duly kept, observed and performed all the requirements and conditions contained in said policy, is not in a position to avail himself of a waiver as to examination under oath. 246.

INSURANCE, LIFE—

See Mutual Benefit Societies.

Policy not assignable by a married woman under the first clause of Section 3629; but an assignment to a wife and her assigns, with a reversion back to her husband in case of her prior death, creates an estate solely for her use, and is valid under the second clause or exception of the statute. 646.

Construction of Section 3630 and the amendments thereto with reference to the parties to whom certificates are payable. 673.

INTEREST—

Collected by a village treasurer on deposits of public funds may be recovered by whom. 201.

INTERROGATORIES—

Every reasonable hypothesis will be indulged for the purpose of reconciling the answers to special interrogatories with the general verdict. 627.

INVENTORIES—

A tax inquisitor is not excluded from an examination of the inventories in the probate court for the purpose of discovering the existence of property omitted from the tax duplicate. 153.

ISSUE (Question)—

Not made up where it is desired to interpose the defense of contributory negligence, unless. 527.

JAIL MATRON—

Discretion of probate judge as to appointment of, not limited to personal fitness. 5.

JUDGE—

See Courts.

A judge, whether acting honestly, negligently or corruptly, can not be held in a civil action for any judicial act, finding, judgment or decree relating to a matter within his jurisdiction; the jurisdiction here meant is jurisdiction as a matter of law, and not as determined by such judge from the facts. 469.

The discretion of probate judges as to the appointment of jail matrons can not be directed or controlled by mandamus. 5.

Mandamus to compel a trial judge to sign a bill of exceptions; what the answer must contain to constitute a defense. 283.

JUDGMENT—

Judgment debtor must have notice of assignment of interest of plaintiff's attorney therein. 366.

Will be granted on a special verdict only, when. 448.

Default judgment taken before answer day; appeal to the common pleas; last answer day occurs, when. 251.

Proceeding for vacating a default judgment by motion; liens preserved and such order made as the verdict warrants. 251.

The control of a court over its judgments up to the end of the term in which they were rendered is in no wise affected by Section 5354. 321.

A judgment entered in the absence of the defendant or his attorney will not be set aside because of the negligence or inadvertance of the attorney, or because of the failure of the clerk of court or any one else upon whom he may rely to inform him that the case was coming on for determination. 321.

JUDICIAL POWER—

As exercised in fixing punishment, distinguished from the power to pardon, or the power to release from punishment for humanity's sake. 65.

JUDICIAL SALES—

A party is not prejudiced by two decrees to sell, one ordering an appraisal and the other an upset price, especially if the sale realized more than two-thirds of the appraisal and more than the upset price. 549.

JURY—

Examination of, on their *voir dire*; evasive and misleading answers ground for a new trial. 575.

When proposed jurors are sworn on their *voir dire*, they are sworn to tell the whole truth, and not a part of it, and where such evasion conceals their disqualification they are guilty of misconduct. 575.

JURISDICTION—

To order a Beal law election is lost, where names are withdrawn from the petition to a number less than the requisite forty per cent. before action is taken on the petition. 17.

A court is without jurisdiction over an action for wrongful death, where the suit was filed prior to the giving of bond by the administrator. 45.

Of the common pleas in an action by a guardian who has become a non-resident after approval of his bond, but whose sureties are within reach. 88.

The petition is jurisdictional in the matter of an election under the Brannock law. 129.

A probate judge has final jurisdiction in a proceeding to contest an election under the Brannock liquor law. 129.

Of council to order a street improvement under 90 O. L., 156. 216.

Is not conferred by a motion to discharge an attachment, where it appears that the allegations upon which the attachment is based, are false. 345.

Can not be conferred by consent of the accused upon a justice of the peace to hold a criminal trial outside of the township in which he resides and was elected. 555.

Of the probate court is general within the sphere of matters assigned to it by the Legislature, and its orders and decrees require no affirmative evidence to indicate such jurisdiction. 549.

Facts which are not jurisdictional and need not appear in the journal entries of the probate court. 549.

The common pleas court is without jurisdiction, under 97 O. L., 546, to grant permission to other than steam railroads to cross streets at grade. 561.

JUSTICE OF THE PEACE—

Appeal from; last answer day occurs, when. 251.

Jurisdiction of and power to hold court distinguished; authority to hold a criminal trial outside of the township in which the justice resides and was elected is not conferred by consent of the accused. 555.

LACHES—

May deprive a plaintiff of the right to enforce a covenant against the manufacture or sale of intoxicating liquor on the land conveyed. 141.

LANDLORD AND TENANT—

Failure to deliver part of the premises avoids the lease; acceptance of part of the premises not a waiver of right to abandon lease, when lessee is not put in possession of all the premises. 50.

Implied covenant on the part of the lessor to deliver the premises to the lessee the moment he is entitled to take possession. 50.

The doctrine of *caveat emptor* applies to one leasing an unsafe building, and the contract of lease is entered into subject to the superior right of the state to order the building razed in the event that it becomes a menace to the public. 393.

An order by a building inspector that an unsafe building be torn down is not an eviction of the tenant by title paramount and gives no right of action against the land-

lord, unless; evidence that the building could have been rendered safe by shoring up, incompetent, when. 393.

LAW AND FACT—

A court would be warranted, under the facts presented in the case at bar, in saying to the jury as a matter of law that there was no contributory negligence. 8.

Where one is injured upon a public way, under the circumstances of this case, the question of the liability of the defendant municipal corporation is one of fact. 362.

LEASE—

Acceptance of a part of the premises not a waiver of the right to abandon the lease for failure to deliver all the premises. 50.

Covering an unsafe building is subject to the superior right of the state to order the building razed on account of its unsafe condition, and in the absence of a covenant broad enough to survive such an action, no liability arises against the landlord. 393.

An exclusive license to enter upon land and mine coal therefrom is a lease, when. 424.

Sub-lessees under a street railway grant are bound by all the limitations embodied in the grant to the original company. 489.

LEGAL REPRESENTATIVES—

Means the family and heirs of a deceased member of a mutual benefit society, and not his administrator, as Section 3630 stood before the amendment of 1891. 673.

LICENSE—

An exclusive license to mine coal will be treated as a lease and not as a sale of the property, and the royalties provided for therein as rentals, and no more. 424.

LIFE TENANT—

Binds the property by signing for a street improvement. 216.

LIMITATION OF ACTIONS—

The limitation of two years is

an essential condition of the right to bring an action for wrongful death, and begins to run at once against the beneficiaries. 45.

The common law rule preventing the application of the statute of limitations to claims in favor of a wife against her husband existing during coverture has been abrogated. 518.

Not suspended by the appointment of an executor or administrator. 518.

The statute of limitations can not be successfully pleaded as a defense to a suit to quiet title, when; but with respect to a cause of action which the plaintiff voluntarily sets forth in his petition, the statute may be pleaded in defense. 269.

Does not begin to run in favor of a tenant in common until, when. 269.

LIQUOR LAWS—

Names may be withdrawn from a petition for a Beal law election, with or without the consent of council, at any time before the election is ordered. 17.

Where names are withdrawn to less than the requisite forty per cent. before action is taken on a petition for a Beal law election, council loses jurisdiction to order an election. 17.

Verification of petition under the Brannock law; summons; appearance; contest of election. 117.

Petition for an election jurisdictional under either the Brannock or the Beal law; must substantially comply with law under which the election is to be held; is fatally defective where there is a failure to describe any residence district in the city, or to describe the entire city as being a residence district. 129.

Procedure to contest an election under the Brannock law. 129.

A judge of the probate court is clothed with final jurisdiction in a contest of an election under the Brannock law, without the inter-

vention of freeholders as provided for in the contest of an election of a justice of the peace. 129.

A petition for an election under the Brannock law which has been filed with the mayor, is a public document and open to inspection by any citizen or petitioner in the district. 179.

Not error for a mayor to overrule a motion for a change of venue in a prosecution for keeping a place where intoxicating liquors are sold, when. 241.

Affidavit charging keeping a place where intoxicating liquors are sold, is not bad for duplicity because it charges several distinct offenses of the same kind and requiring the same punishment. 241.

Proof of a single sale of intoxicating liquor is sufficient to establish a charge of keeping a place where such liquors are sold. 241.

The *per diem* which the prosecution has promised to pay its witnesses, in addition to what is paid to them by the state, is a proper subject of cross-examination. 241.

Rules as to the formality and regularity of elections held under the Ohio statutes for restriction of the sale of liquor should be deduced direct from the statutes and principles relating to elections and decisions of our own state. 329.

The designation in an order for an election under the Brannock law of a voting place fifteen feet beyond the boundary line of the proposed district does not invalidate the election, when. 329.

The provision of the Brannock law that an election shall be held in not less than twenty or more than thirty days after the filing of the petition is mandatory, and compliance therewith is essential to the validity of the election. 353.

A petition for an election under the Brannock law may be withdrawn, and the boundaries of the proposed district changed, and the petition refiled; refiled of the

sheets constituting the original petition is sufficient, when. 356.

A petition for an election under the Brannock law which is legally insufficient does not have precedence over a legal petition, covering overlapping territory, which is properly filed before the insufficient petition is made sufficient. 358.

Assent of signers to the refile of a petition which has been withdrawn. 356.

Orders made by judges under the Brannock law are merely ministerial and not judgments of the court, and may be reviewed by an associate judge. 358.

Petition for an election under the Beal law sufficient as to number of signers when they equal forty per cent. of the number of votes cast at the last preceding election. 373.

Not competent for contestors of an election under the Beal law to amend their petition at a later date than twenty days after the election. 373.

Irregularity in publication of notice of Beal law election; irregularity in form of ballot used; irregularity on the part of election officers in going out to the street to receive the ballot of a voter who is unable to leave his carriage; casting of a ballot improperly marked is not the casting of a vote; ballot cast by an insane man; no election where the result turns on the vote of insane man. 373.

Error does not lie to the refusal of a mayor to grant a trial by jury to one charged for the first time with permitting a saloon to remain open on Sunday. 429.

An affidavit charging the keeping of a place open on Sunday where intoxicating liquors are on other days of the week exposed for sale and sold, is sufficient, when. 429.

Contest of election under the Beal law; liquor sellers not enti-

tied to be made parties thereto; voters at a local option election must vote in their own precincts; voting place of inmates of an infirmary is the infirmary precinct; votes shown to have been illegal deducted from the total; use of the carbon ballot; gross frauds at the polls. 453.

MANDAMUS—

Discretion of probate judge in the matter of appointment of jail matrons can not be directed or controlled by mandamus, when. 5.

To compel the signing of a bill of exceptions; what the answer of the trial judge must contain to constitute a defense. 283.

Mandamus lies to compel the signing and settling of a bill of exceptions, when. 283.

MASTER AND SERVANT—

Where no contract of apprenticeship exists, the refusal of a foreman to permit a minor employe to leave his work for medical aid, except at the risk of discharge, is a breach of duty not growing out of the employment, and the master is not liable for fatal consequences resulting. 197.

MAYOR—

A petition for an election under the Brannock law which has been filed with the mayor is a public document which any petitioner or elector of the district has the right to inspect. 179.

Not error for a mayor to overrule a motion for a change of venue in an action for keeping a place where intoxicating liquors are sold, where it does not affirmatively appear from the record that there was any authorized person to whom the case could have been legally sent for trial, and the ground of the motion was that the mayor was a material witness in the case. 241.

Not authorized to collect fees from defendants convicted before him, unless council shall have first fixed the fees by ordinance; where

there has been a failure to fix fees, but fees have been collected by the mayor, they can not be recovered. 99.

Irregularity in publication of proclamation of, for a Beal law election without significance where the number of votes cast was greater than at the last preceding election. 373.

On review of a prosecution before, a court is not bound to consider the weight of the evidence, where the bill of exceptions does not show that it contains all the evidence. 429.

MECHANICS LIENS—

Rights of sub-contractors and other creditors after the death of the principal contractor. 150.

MINES AND MINING—

An exclusive right to enter upon and mine coal, such as is presented in this case, is a lease and not a sale of the property, and the royalties provided for therein are rentals, and no more. 424.

Technical words and phrases in a lease for mining coal will not be permitted to defeat the manifest intention of the parties as otherwise expressed in the instrument. 424.

MINISTERIAL ACTS—

Orders made by a common pleas judge with reference to an election under the Brannock law are ministerial and not judicial. 358.

MISCONDUCT—

Of jurors in concealing their disqualification to sit in a given case by giving evasive and misleading answers when examined on their *voir dire*. 575.

MORTGAGE—

Equitable foreclosure of; can not be maintained that the fund realized from, was applied in whole or in part to a particular note upon which there was a surety, when; in a suit against the principal debtor and the surety, it is not error to permit the introduction of parol testimony to explain

the words "unless otherwise satisfied" found in the mortgage. 145.

Widow not subrogated to lien of, where discharged in part with her separate means. 209.

Rights of mortgagee upon the death of the mortgagor in possession of the goods, with the condition of mortgage broken at time of death; replevin against administrator not available. 653.

MUNICIPAL CORPORATIONS—

Conflict between agencies of; employees of can not rest right of recovery for services upon contract; wrongful suspension of employees; failure to appropriate sufficient funds to pay. 1.

May recover fees collected by mayor from defendants convicted of violation of ordinance, when. 99.

Not a trustee in the refunding of street improvement bonds and need not account to abutting property owners for the profits arising therefrom. 261.

A municipal corporation has no rights in the streets which can be sold to a gas company, and exactions from such a company whether for revenue or for other purposes are void. 293.

Liability of, for injury sustained by one who went upon a lighted public way in the night time, which was known to be out of repair, but which could not be easily avoided, and was injured by reason of the light going out, is a question for the jury. 362.

Liability of, for tort committed by an employe must be determined from the nature of the employment; liable for an assault by a care-taker of a public park committed while acting in the line of duty. 480.

Permission to cross a street at grade must be obtained from, by railways other than steam, either by agreement or condemnation; the jurisdiction conferred by 97 O. L., 546, upon the common pleas courts refers only to crossings by steam roads. 561.

Provision for the drainage of surface water by a municipality is a purely judicial duty, for the breach of which no liability attaches. 627.

The keeping of a sewer open and of sufficient capacity to carry off refuse and filth is a ministerial duty, and a municipality failing therein is liable for resulting damages to an abutting property owner. 627.

The authority to sell water works bonds having once been given and a public sale attempted in good faith, the withdrawal of the bids does not work a rescission of all the steps which had preceded, and further authority from council is not necessary to render valid the subsequent sale of the bonds at private sale. 609.

A suit by a tax-payer to enjoin the sale of water works bonds, brought under the circumstances of this case, must be treated as brought in the interest of a competing water company, and the plaintiff tax-payer has no standing in court. 609.

MUTUAL BENEFIT SOCIETIES—

Construction of Section 3630 as originally enacted, as amended February 3, 1875, and as again amended March 31, 1891, with reference to parties to whom certificates are payable. 673.

The words "legal representatives," as used to designate the beneficiary under a certificate issued prior to the act of March 31, 1891, mean the "family and heirs of the deceased member," and not his administrator or executor. 673.

NECESSARIES—

The services of a physician are clearly within the term "necessaries." 105.

The special exemption allowed to one with a family not available to a stepfather who has no family except a stepdaughter who lives with her maternal grandmother. 105.

NEGLIGENCE—

Ordinary care requires no such prescience as would have been necessary to have avoided the injury in the case at bar. 8.

A charge to the jury as to facts excusing contributory negligence is not prejudicial to the defendant, where no contributory negligence existed. 8.

The fact that others differently situated saw a locomotive backing toward a crossing on a dark night without a headlight does not warrant a reviewing court in saying that one who was standing on the crossing and did not see it was guilty of contributory negligence. 30.

Child killed on a pony track operated by an independent contractor at a summer resort; company controlling the resort held liable. 81.

Refusal to permit an employe to leave his work for medical aid, except at the risk of discharge, is not a breach of duty for which the employer can be discharged in case of a fatal result. 197.

Questions of, in going upon a way known to be out of repair, but which could not be easily avoided. 362.

The rule which requires the plaintiff to show that he was without fault does not apply, where the action is for damages sustained in the defendant's employ, and the immaturity of the plaintiff is set out in the petition. 448.

Only ultimate and determinative facts need be incorporated in a special verdict, where the gravamen of the petition is the failure of an employer to have a dangerous machine guarded, and failure to instruct an immature person in the handling of the machine. 448.

The issue of contributory negligence can only be raised, how. 527.

Liability of street railway company to intending passenger injured before coming in actual contact with the car, by the falling of a broken trolley pole; implied

assent of the company to carry; constructive control over waiting passenger; liability of company for injury to intending passenger within the sphere of peril from the car. 537.

Questions of, where one stepped into an open elevator shaft in the belief that the cab was there to receive him. 581.

As to "excusing" negligence. 581.

The keeping of a sewer in proper condition is a ministerial duty, and where the sewer is inadequate to carry off the refuse and filth, which under certain conditions are backed upon the property of an abutting owner, the municipality is chargeable with the resulting damage. 627.

Pleading sufficiently broad to make competent testimony to the effect that the motorman of a car in collision with a wagon was intoxicated five hours before the accident. 633.

NEWSPAPER—

A newspaper article containing baseless charges of corruption against a grand jury is a contempt against the court which imperilled the jury, for which summary punishment may be visited upon the guilty parties. 593.

NEW TRIAL—

Misconduct of jurors in giving evasive or misleading answers in their examination on their *voir dire* is ground for a new trial. 575.

NON-SUIT—

It is the duty of the court to grant a non-suit (or direct a verdict for defendant at the close of plaintiff's evidence) whenever the probative value of plaintiff's evidence is so slight that it would be necessary to grant a motion for a new trial if a verdict for plaintiff were based upon it. 469.

NOTARY PUBLIC—

Can not commit a witness for contempt in refusing to answer

questions which call for hearsay testimony. 93.

Can compel the claim agent of a street railway company to produce the reports of an accident, made to him by the conductor and motorman of the car on which the accident occurred, where a deposition is being taken in a suit growing out of the accident. 93.

NOTICE—

The requirement of Section 5833 as to, is not satisfied, where the principal debtor is a woman, by notice to her husband. 145.

Of the intention of a fire insurance company to have an examination of a policyholder whose property has been destroyed is sufficient, when it states the time and place of the examination and the name of the person who is to conduct it. 246.

Must be given to judgment debtor of assignment of attorney's interest in the judgment. 366.

Sufficient for a local option election, notwithstanding an irregularity in the publication of the mayor's proclamation, where the notice brought out more votes than were cast at the last preceding election. 373.

NUISANCE—

A steam railway track unlawfully in the street is a public nuisance which may be enjoined by one specially damaged thereby. 109.

OFFICE AND OFFICER—

Tenure of office of secretary of water works trustees; removal of secretary by abolishment of office. 55.

Misconduct of councilmen in office; charge of bribery, and that councilmen are influenced in their voting by one who contributed to their individual campaign funds. 57.

A tax inquisitor is not a public officer but an employee, and the provision for his appointment rather than election is therefore

not open to constitutional objection. 153.

The allowance and ordering of payment of claims by the proper officials not *res judicata* when the claims were founded on contracts invalid for non-compliance with statutory requirements. 303.

Rule as to voluntary payment does not apply to payment by a public official of a claim contracted without authority of law. 303.

Assistant prosecuting attorneys are not officers in the sense the word is used in the state Constitution, but are persons authoritatively appointed to assist an officer in an office provided by law. 505.

The constitutional inhibition against the increase or diminution of the salary of an officer during his existing term does not render it incompetent for him to accept compensation, fixed by the General Assembly after he entered upon the duties of his office and before the expiration of his term, where no compensation was theretofore provided. 544.

County commissioners, whose salaries were fixed by statutes declared unconstitutional during their terms of office, were left in the position of an officer for whom no compensation had been provided, and can not be enjoined from receiving the pay provided by the act of April, 1904, notwithstanding the pay is higher than that provided when they came into office. 544.

PARDON—

Power to grant, as distinguished on the one hand from judicial power exercised in fixing the term of punishment, and the grace on the other hand whereby the prisoner is released from punishment on grounds of humanity. 65.

The pardoning power and the power of respite. 533.

PARTIES—

Liquor sellers not entitled to be made parties to a suit contesting a local option election. 453.

The proper party plaintiff in a suit to recover interest on public deposits paid to a village treasurer is the officer or officers authorized to care for or protect the public funds. 301.

The dismissal of one of two defendants is not ground for complaint by the other against whom judgment has been obtained, where their liability, if any, was separate as well as joint, as in the case of collision between a street car and a wagon, causing the injury of a passenger. 633.

PARTITION—

It can not be maintained that a particular note which was secured by mortgage, but upon which there is a surety, is merged in a finding in a suit in partition to which the surety was not a party; neither can it be maintained that the fund realized on the mortgage was applied in whole or in part on this particular note. 145.

Quit-claim deed passes after-acquired title in a partition case. 269.

PARTNERSHIP—

Association in a joint enterprise under conditions such as to those presented at bar constitutes a partnership, and securities thus held are properly listed for taxation in the township where the managing partner resides. 78.

PAYMENT—

The rule as to voluntary payment does not apply to a voluntary payment by public officials of a claim contracted without authority of law. 303.

PHYSICIANS—

A corporation organized for the purpose of defending physicians against civil suits for malpractice comes within the bar of Section 3225, forbidding the carrying on of a professional business by a corporation. 185.

PENALTY—

Imprisonment is not a part of, where it is imposed only to enforce

payment of a fine and costs under a police regulation. 429.

PLEADINGS—

In an action for damages on account of the death of a boy by being thrown from the back of a pony at a public resort, failure of those in charge of the resort to exercise ordinary care is sufficiently charged, when. 81.

Objection to an administrator maintaining suit for the wrongful death of the testator must be taken by demurrer or by special denial. 81.

As to verification of a petition to contest a Brannock law local option election. 117.

Question of capacity to sue for recovery of interest paid to a village treasurer may be raised by demurrer, but must be specially assigned. 201.

Capacity to sue may be raised by demurrer if specially assigned, when. 201.

What must be alleged in order to render valid an attachment levied on money deposited as bail. 206.

A bad answer is good enough for a bad petition. 206.

A petition which pleads an oral contract with a board of health for the providing of necessities to a family quarantined on account of small-pox is good under Section 2821 *et seq.* as against a general demurrer. 398.

An allegation in a suit upon a policy of insurance that the plaintiff has duly kept, observed and performed all the conditions of the policy prevents him from availing himself of a waiver of one of the conditions of the policy. 246.

How the statute of limitations may be successfully pleaded as a defense to an action to quiet title. 269.

A demurrer to an answer, which denies averments of fraud, and alleges that the price charged was reasonable, that plaintiff has suffered no damage, and that non-

compliance with statutory requirements was inadvertant rather than willful, raises different questions from those determined on demurrer to the question and should be determined independently from the ruling on demurrer to the petition. 303.

A motion to discharge an attachment on the ground that the affidavit upon which it is issued is false, does not confer jurisdiction. 345.

Language of a motion and the intention of a party making it. 345.

In a suit to contest a Beal law election; testimony must be restricted to irregularities specified in the petition; not competent to amend petition later than twenty days after the election. 373.

The exception found in the statute relating to keeping open on Sunday a place where intoxicating liquors are sold on other days of the week, need not be pleaded in a prosecution for. 429.

Where an answer is a general denial and a plea of contributory negligence, the plea as to contributory negligence is not mere surplusage, and a motion to make the plea more definite and certain will lie. 527.

If the allegations necessary to state the cause of action in no way suggest negligence on the part of the plaintiff, the issue of contributory negligence can only be raised when pleaded as a defense, or when the testimony of the plaintiff tends to show contributory negligence. 527.

Where a plaintiff who has sued for damages on account of personal injuries dies before the action is determined, and the suit is revived in the name of the administrator, the filing becomes necessary of an amendment to the petition or a supplemental petition, setting out when the original plaintiff died and whether death was the result of the injuries alleged in the petition. 559.

Averments of a petition sufficiently broad to make competent testimony to the effect that the motorman of a car in collision with a wagon was intoxicated five hours before the accident. 633.

PRINCIPAL AND SURETY—

A review of the account of a guardian, whose account has been confirmed by the probate court and who has become a non-resident, may be had under Section 6289, and if anything is found due, the action may proceed upon the bond. 88.

PRISONER—

Release of, by mistake equivalent to a negligent escape. 65.

Release of, from workhouse under Section 1547-67; regulations necessary to make valid; approval of mayor; state prisoners distinguished from those sentenced by a municipal court. 65.

PRIVILEGE—

Of witness; can not be compelled to produce books and papers where it is evident to the court that by so doing the party to whom they belonged would be subject to penalties and punishment. 57.

Reports made by street railway conductors and motormen to the claim agent of the company, respecting accidents on the line, are not privileged, and such reports must be produced in response to a *duces tecum* in actions growing out of such accidents. 93.

The fact that baseless charges of fraud and corruption against a grand jury relate to past action of the jury, as distinguished from action which is prospective, does not render the matter privileged. 593.

In refusing to answer on the ground that the answer would incriminate him, the witness is the sole judge as to whether such is the fact, subject only to an action for damages by the aggrieved party. 641.

PLEDGE—

Life insurance policy assigned by a wife as security on a note executed by her husband; rights of pledgee who has paid the premiums. 646.

PONY TRACK—

Operation of, at a public resort imposes a duty upon the owner of the resort to see that the work is carefully performed, and this duty can not be delegated to an independent contractor. 81.

POOR—

The voting place of paupers resident in an infirmary is the infirmary precinct. 453.

POWER—

A municipality is without power to sell the use of its streets to a gas company or to make any exaction for such use. 293.

PREJUDICE—

A court has power to try an attorney who misbehaves in the presence of the court, notwithstanding the filing of affidavits of prejudice. 657.

PRODUCTION OF PAPERS—

Can not be compelled, where it is evident to the court that they must tend to subject the party to whom they belong to penalties and punishment. 57.

PROMISSORY NOTE—

Surety claiming release from, by reason of an extension must prove that the extension was granted upon a definite agreement based upon a sufficient consideration. 646.

PROPERTY RIGHT—

There is no property right attaching to a dead body, and it can not be disposed of by will. 405.

PROSECUTING ATTORNEY—

An allowance of \$1,250 per annum by the county commissioners under Section 845 to prosecuting attorney will be upheld, when. 505.

Assistant prosecuting attorneys are not officers in the sense the

word is used in the state Constitution. 505.

The statutory exceptions which have been made relative to the compensation of prosecuting attorneys in the different counties, and the provision that in counties having no county solicitor the prosecuting attorney shall act as the legal adviser of the county commissioners, are not unconstitutional. 505.

PUBLIC POLICY—

Conflict between the agencies of a municipality; suspension of employe of municipality because of failure to appropriate funds to pay for his services is not wrongful; a civil service order without effect against such suspension. 1.

PUBLICATION—

An irregularity in the publication of the mayor's proclamation for a Beal law election does not invalidate the election, where it appears that the notice was sufficiently general to bring out more votes than were cast, at the last preceding election. 373.

RAILWAYS—

Occupation of streets by the tracks of; rights of abutting owner; tracks unlawfully in street a public nuisance; city ownership of railway; power of board of public service to authorize occupation of streets with tracks. 109.

Right of railway to cross state lands; authority so to do obtained from insane asylum trustees; once exercised became in this case *functus officio*. 234.

Duty of, with reference to the switching of cars arriving by connecting lines; such service may be compelled by injunction, when; switching of cars may be refused for failure to pay demurrage charges, when; disputed items in bill for demurrage charges; legality of reasonable demurrage charges. 412.

Whether or not a railroad is a steam road may be determined by evidence as to its construction, its

operation, the character of business in which it is engaged and its manner of conducting business. 561.

The law relating to the establishment of grade crossings (97 O. L., 546) has exclusive reference to steam railroads, and the common pleas court is without jurisdiction to grant permission to a railroad to lay its tracks over a street at grade, if such road is not a steam road; but such permission may be granted conditional upon the acquirement of the right from the municipal authorities either by agreement or condemnation. 561.

REMEDY—

Mandatory injunction an appropriate remedy to enforce the right of inspection of a Brannock law petition. 179.

REPLEVIN—

Not available against an administrator for recovery of possession of mortgaged goods in possession of the mortgagor with the condition of the mortgage broken at the time of his death. 653.

REQUISITION—

Immaterial that the warrant was signed in blank by the governor, when; direction that the warrant issue may be given by the governor by telephone; the affidavit which accompanies the requisition should state positively the facts constituting the offense; Section 95 provides regulations only for the governor, is not mandatory, and does not confer or limit jurisdiction. 265.

RIGHTS—

A substantial right is denied to a litigant where the jurors in their examination on their *voir dire* gave evasive and misleading answers which conceal their disqualification to sit in the case. 575.

SALARY—

Of an officer may be increased or decreased during his existing term, when. 544.

SCHOOLS—

Liability of public school property for street assessment levied before purchase of the property by school board. 122.

School property not rendered liable for street assessment by the petition of the board for the improvement of the street, if they knew that the property would not be liable. 122.

Uncertain effect of new school code as to liability of public school property for street assessments. 122.

Custody of sinking funds of school districts is in the board of education, but the management and control thereof is in the board of commissioners of the sinking fund of a school district. 401.

SCINTILLA RULE—

No longer has its former force and vigor in Ohio; duty of the court to grant a non-suit, when. 469.

SECRETARY—

Of water works trustees not an officer within the legal acceptance of the word, and one appointed thereto for a specified term, but who was discharged before the term expired, can not enforce a claim for salary for remainder of term. 55.

Of state can not refuse a certificate to a foreign corporation, seeking to defend physicians in Ohio against civil suits for malpractice, on the ground that its business is an insurance business; but such a business is professional, and the corporation is barred by Section 3225. 185.

SENTENCE—

The authority to suspend sentence for a reasonable time within which to file a petition in error, does not authorize admission of the one convicted to bail pending the hearing on error. 622.

SEWERS—

The maintenance of sewers of

sufficient capacity to carry off refuse and filth and the keeping of them open is a ministerial duty, neglect of which renders a municipality liable for resulting damages to an abutting property owner. 627.

Provisions for the drainage of surface water by a municipality is a purely judicial duty, for the breach of which no liability attaches. 627.

SICK BENEFITS—

Damages on account of an injury can not be reduced by the amount of sick benefits received. 30.

STATUTES CONSIDERED—

Section 3630, before and after amendment, with reference to the parties to whom a certificate may be paid. 673.

97 O. L., 86, relating to the appointment of jail matrons. 5.

97 O. L., 436, forbidding hunting or shooting on Sunday. 13.

Section 225 of the Municipal Code not applicable to a trial of councilmen. 57.

Section 1547-67, relating to discharge of prisoners from workhouse. 65.

Section 6289, relating to accounts of a guardian. 88.

Section 1843, relating to fees collected by mayors from defendants convicted of violation of ordinances. 99.

Sections 3137a and 3139, relating to stepchildren. 105.

Section 5833, relating to notice by a surety to the principal debtor. 145.

Sections 1343a, 1343b, 1343-1, 1343-2, 1343-3 and 1343-4, relating to the appointment of tax inquirers. 153.

Section 3225, forbidding the carrying on of a professional business by a corporation. 185.

90 O. L., 156, relating to street improvements. 216.

Section 6529, relating to change

of venue, not applicable to a mayor's court, when. 241.

Section 7033 and the proviso therein, relating to the transaction of business on Sunday. 276.

Section 95, regulating the issuing of requisition by the governor. 265.

Section 5354, relating to control of the court over its judgments. 321.

Section 2834b; the restrictive clause in. 303.

Section 1277, authorizing the recovery of money paid out of the county treasury under illegal contract. 303.

The feature of the Brannock law relating to time for holding an election is mandatory. 353.

Section 3970-1, relating to the control of school sinking funds. 401.

Section 3970-4, relating to custody of school sinking funds. 401.

Section 4047, relating to the custody of school sinking funds. 401.

Sections 3340 and 3341, relating to switching facilities. 412.

Section 4364-20, relating to keeping open on Sunday places where intoxicating liquors are sold. 429.

Section 1777, empowering the city solicitor to sue in the name of the city, whenever the conditions of the grant of an easement creating a public duty is being violated. 489.

The Rogers law and the inter-urban act with reference to the issue and acceptance of transfers. 489.

Section 4974, relating to the creation of trusts. 518.

Section 2862, relating to counsel fees in actions brought against county officers. 505.

Section 1271, relating to the appointment of assistant prosecuting attorneys in certain counties. 505.

Section 1297, relating to the salaries of prosecuting attorneys in certain counties. 505.

Section 845, relating to attorneys appointed by county commissioners. 505.

The act of April 21, 1904, fixing the compensation of county commissioners. 544.

Sections 6017, 6018 and 6005, relating to administrators. 549.

97 O. L., 546, relating to railway crossings of streets at grade. 561.

Sections 7321, 7325 and 7362, relating to imprisonment and suspension of sentence. 622.

Section 123 of the municipal code. 609.

Sections 6090 and 6091 of the administration act. 653.

Section 3629, giving the right to a wife to insure the life of her husband. 646.

STEPFATHER—

A stepchild is not the child of her stepfather within the meaning of the act providing for exemption in lieu of homestead, unless so declared to be by the probate court under Sections 3137a and 3139. 105.

SPECIFIC PERFORMANCE—

A finding or decree wherein specific performance is involved will not be disturbed, unless it is made to appear that the order below was based upon error or misapprehension. 501.

The grace of the court which prompts the enforcement of specific performance should not be bestowed, when in addition to inadequacy of consideration there appears to have been a delusion on the part of the seller regarding property values. 501.

STATE—

Lands of; right of railway to cross land of insane asylum. 234.

STREET—

A steam railway track unlawfully in the street is a public nuisance and may be enjoined by one who is specially damaged thereby. 109.

Board of public service not authorized to grant right to lay railway track in street, when. 109.

Railway track in street, but not opposite the property of a complaining abutter. 109.

Mere delay in travel suffered by an abutter in common with the general public from the presence of a railway track in the street is *damnum absque injuria*, when. 109.

School property not rendered liable to assessment for improvement of, by petition therefor, when. 122.

Where the lien of an assessment has already attached, it will not be defeated by the subsequent purchase of the property by a school board. 122.

Uncertain effect of new school code as to liability of public school property for street assessment levied after passage of code. 122.

To render effective a signature to a petition for a street improvement, it must be that of the owner of the property at the time of the passage of the ordinance ordering the improvement. 216.

Jurisdiction of council to order improvement of; nature of title in petitioner necessary to give validity to petition; signature of dowager does not, but of owner of life estate does bind the property; benefits where heavy traffic has injured the street. 216.

Liability of street railway company for its proportionate share of all items, including curbing, entering into the cost of a street improvement as to which the company is bound by its franchise to bear a *pro rata* share. 438.

The filing of specifications for the repair of a street may be dispensed with, where the work is to be performed by the municipality directly, and not by contract. 368.

The fact that a street is repaired in sections or parts does not invalidate the assessment, therefor. 368.

The common pleas court is without jurisdiction under 97 O. L., 546, to grant permission to a railroad to cross a street at grade unless such road is a steam road; if not a steam road, permission to cross must be conditioned upon the acquiring of the right from the municipality either by agreement or condemnation. 561.

STREET RAILWAYS—

Reports of accidents made to a superior officer by conductors and motormen are not privileged, and must be produced under a subpoena *duces tecum* in suits against the company on account of such accidents. 93.

Construction of provision in grant as to the company's share of cost of improving the street; liability of the company for cost of curbs and all items of cost entering into the improvement. 438.

Construction of the Rogers law and the interurban act with reference to the issue and acceptance of transfers; a transfer not a mere privilege, but a right based upon a consideration; the words "traffic agreement" a misnomer, when; classification of passengers as urban and interurban without warrant. 489.

Sub-lessees, equally with lessees, of rights under a street railway franchise are bound by all the limitations of the grant to the original company. 489.

Authority of city solicitor, under Section 1777, to sue to enjoin a traction company from refusing to give or receive transfers in accordance with the grant of the original company. 489.

Liability of company to intending passenger who has come within a sphere of peril from the car and is injured by the company's appliances before actual contact with the car. 537.

Where it was charged that the motorman of the car in collision was intoxicated five hours before the accident occurred. 633.

Charge of court as to highest degree of care, and pecuniary injury from loss of time; instructions on abstract proposition of law open to technical objection, but not prejudicial. 633.

SUBROGATION—

Widow is not subrogated to mortgage lien discharged in part with her separate means. 209.

Private uses of, as distinguished from contemplated uses at time of original dedication. 257.

The laying of telephone mains not embraced within the original dedication and imposes a new servitude. 257.

A municipal corporation has no rights in the streets which can be sold to a gas company, and exactions from such a company, whether for revenue or for other purposes, are void. 293.

SUMMONS—

Failure to issue, upon the mayor under a petition to contest a Brannock law election makes necessary the striking of the petition from the files. 117.

SUNDAY LAWS—

The law prohibiting hunting or shooting, or having in the open air any implements for hunting or shooting on any Sunday, is constitutional. 13.

The proviso contained in Section 7033, relating to the transaction of business on Sunday, covers the period of time commonly observed as the seventh day, or Sabbath, which begins with the appearance of the stars on Friday evening and ends at the same time on Saturday evening. 276.

An affidavit charging keeping a place open on Sunday where intoxicating liquors are on other days of the week exposed for sale and sold, is sufficient, when. 429.

Error does not lie to the refusal of a mayor to grant a trial by jury to one charged for the first time with permitting a sa-

loon to remain open on Sunday. 429.

SURETY—

Rights of a surety on one of several notes secured by mortgage, which was foreclosed in a partition proceeding to which he was not a party. 145.

Surety on note claiming release by virtue of an extension; burden upon the surety to prove that the extension was granted upon a definite agreement based upon a sufficient consideration. 646.

The requirement of Section 5833 as to notice by a surety to the principal debtor must be strictly complied with, and where the principal debtor is a woman, notice to her husband does not satisfy the statute. 145.

In a suit against the principal debtor and the surety, it is not error to permit the introduction of parol testimony to explain the words "unless otherwise satisfied" found in the mortgage. 145.

SURPLUSAGE—

In an action for wrongful death or personal injuries, an allegation that the plaintiff was without fault is mere surplusage, when. 527.

Where the answer is a general denial and a plea of contributory negligence, the plea as to contributory negligence is not surplusage. 527.

TAXATION—

Unpaid taxes which were a lien at the time of the transfer of the property can not be recovered by the purchaser on the ground of breach of the covenant of special warranty in a deed conveying only the "right, title and interest" of the grantor. 41.

Of partnership property; injunction against the separate listing of individual interest therein. 78.

Sections 1343a and 1343b, providing for the appointment in certain counties of persons to discover property omitted from the

tax duplicate, are unconstitutional for lack of uniformity of operation; but the limitation found in Section 1343-4 upon the operation of Sections 1343-1, 1343-2 and 1343-3 should be disregarded, and these statutes upheld. 153.

The duties of a tax inquisitor are not those of a public officer, but of an employe, and provision for his appointment rather than election is therefore not open to constitutional objection. 153.

Contracts entered into by county officers with tax inquisitors are not illegal because they stipulate, etc. 153.

A tax inquisitor is not entitled to any percentage added by law or levied and collected as such; is not excluded from furnishing evidence of omitted property to be listed in the name of a decedent; may discover the existence of such property from inventories filed in the probate court; but his percentage will be limited to taxes which should have been returned in the lifetime of the decedent; in the case at bar is entitled to a percentage on addition to the returns of insurance companies for preceding years. 153.

TAX-PAYER—

The moment property is listed and returned to the auditor it becomes charged with taxes, and its owner assumes the legal status of a tax-payer. 505.

A suit brought by, to enjoin the issue of water works bonds, must be regarded under the circumstances of this case as brought in the interest of a competing water company, and the plaintiff has no standing in court. 609.

TELEPHONE—

The laying of telephone conduits in the street is not one of the purposes of the original dedication and imposes no additional servitude. 257.

The direction that a requisition issue may be given by the governor by telephone. 265.

TENANTS IN COMMON—

The statute of limitations does not begin to run in favor of a tenant in common in possession until some overt act takes place, which unmistakably indicates an assertion of ownership of the entire premises to the exclusion of the co-tenant. 269.

Where quit-claim deeds are given for the sole purpose of effecting a partition, an exception is made to the general rule as to after-acquired title in real estate, and such deeds will be treated as containing an implied covenant that the grantor owns the premises conveyed. 269.

The fact that the plaintiff in an action to quiet title obtained a quit-claim deed from one of the defendants, will not be held to raise a presumption or acknowledgment of co-tenancy. 269.

TERM OF OFFICE—

A secretary of water works trustees, although appointed for a fixed term, can not enforce a claim for salary for remainder of term when discharged before his term had expired. 55.

TIME—

Period of, covered by the proviso contained in Section 7033, prohibiting the transaction of business on Sunday. 276.

Within which an election must be held under the Brannock local option law is mandatory. 353.

TITLE—

After-acquired title to real estate derived through partition proceedings; does not raise a presumption or acknowledgment of co-tenancy, when. 269.

One who is compelled to vacate a building because of an order by the building inspector that it be torn down is not evicted by title paramount. 393.

TORT—

Committed by employe of a municipality; liability of the municipality depends upon the nature of the employment. 480.

TRADES AND OCCUPATIONS—

The business of defending physicians against civil suits for malpractice is a professional, and not an insurance business. 185.

TRAFFIC AGREEMENT—

A misnomer when used by traction companies as in this case. 489.

TRANSFERS—

When a street railway franchise contains a provision for the issuing of, passengers may ask for them, not as a privilege, but as a right based upon a consideration; construction of the Rogers law and the Interurban act with reference to transfers. 489.

TREASURER—

Interest on funds deposited by a village treasurer and paid to him can only be recovered in a suit prosecuted by an officer or officers authorized so to do. 201.

TRIAL—

A demurrer to an answer, which denies averments of fraud in the petition, and alleges that the price paid was reasonable, that the plaintiff has suffered no damage, and that non-compliance with statutory requirements was inadvertent rather than willful, raises different questions from those determined on demurrer to the petition, and should be determined independently of the ruling on demurrer to the petition. 303.

A witness is himself the sole judge as to whether the answer to a question which has been propounded will incriminate him; a witness is within his privilege in refusing to answer as to whether he was the agent of a certain party, when. 641.

TRUST—

A continuing and subsisting trust under Section 4974 is not created by the appointment of an executor or administrator. 518.

VERIFICATION—

Requirement as to, complied

with in the matter of a petition to contest a Brannock law election, when. 117.

VENUE—

Not error for a mayor to overrule a motion for change of, where there was no other person to whom the case could have been legally sent for trial, and the ground of the motion was that the mayor was a material witness in the case. 241.

VERDICT—

Where the gravamen of the petition is failure to have a dangerous machine guarded and failure to instruct an immature person in its use; a jury in returning a special verdict need only state the determinative and ultimate facts. 448.

Silence of the jury upon the question whether the plaintiff was without fault, does not amount to a finding against him in a negligence case, when. 448.

Judgment will be granted on a special verdict only when determinative facts sufficient for its support remain after the verdict has been stripped of all improper matter. 448.

Should be directed for the defendant at the close of plaintiff's evidence, or a non-suit granted, whenever the probative value of plaintiff's evidence is so slight that it would be necessary to grant a motion for a new trial were a verdict for plaintiff based upon it. 469.

Every reasonable hypothesis will be indulged for the purpose of reconciling the answers to special interrogatories with the general verdict. 627.

VOTE—

The casting of a ballot improperly marked is not the casting of a vote, and in determining the number of votes cast, only those indicating the expression of a choice should be counted. 373.

Where a vote is made a tie through inability to determine

how an insane man voted, the court will declare that no election was held under the statute. 373.

WAGES—

Where received in lieu of sick benefits by one who was injured through the fault of another, the amount so received can not be again awarded by a jury in fixing damages. 30.

WAIVER—

Acceptance of part of leased premises not a waiver of right to abandon lease for failure to deliver all the premises covered by the lease. 50.

A policyholder in a fire insurance company who alleges, in a suit on the policy, that he "has duly kept, observed and performed all the requirements and conditions contained in said policy," is not in a position to avail himself of a waiver of a provision therein. 246.

WARRANT—

For requisition may be signed by the governor in blank, when. 265.

WATER WORKS—

The sale of a duly authorized issue of water works bonds can not be enjoined at the suit of a tax-payer who is acting in the interest of a competing water company. 609.

WIDOW—

An ante-nuptial contract or marriage agreement in order to bar a widow from dower must be shown to have been fair, reasonable and just to the wife under all the circumstances existing at the time the agreement was entered into. 33.

There is no statutory provision whereby a surviving wife may elect to take under the law; her rights under the law are not superseded or abrogated by any provision made for her in the will requiring her to elect; a widow who does not elect to take under the will is entitled to dower in

all lands with which her husband died seized, and her distributive share from lands converted into money for distribution. 190.

WITNESS—

Can not be held for contempt in refusing to answer questions which call for hearsay testimony. 93.

Per diem, which the prosecution has agreed to pay them in addition to what they will receive from the state is a proper subject of cross-examination. 241.

The fact that the mayor, before whom a prosecution for keeping a place where intoxicating liquor is sold has been brought, is a material witness is not ground for granting a motion for a change of venue, when. 241.

Is himself the sole judge as to whether an answer will incriminate him; but the party aggrieved may prove if he can in an action for damages that the reason given was false and the refusal to testify willful. 641.

Where a witness who has refused to testify is committed as contumacious, the burden is upon the sheriff in habeas corpus proceedings to show that the commitment was legal. 641.

In the absence of anything in the record showing the nature of the action in which a contumacious witness was being examined, a court will not hold in habeas corpus proceedings that the witness was legally committed for refusing to answer as to whether he was the agent for a certain party. 641.

A jury should be instructed that if they find the hypothesis upon which the opinions of expert witnesses has been based is not in accordance with the facts, such opinions should be treated as of no value. 676.

WILLS—

The rule which permits resort to extraneous evidence to make clear the language used by a tes-

tator in his will, does not permit the reading therein of a provision as to which the will is silent, or of the adding thereto of a substantial bequest. 280.

A testator can not dispose of his body by will. 405.

WORDS AND PHRASES—

Technical words and phrases in a written instrument, such as "devise," "release," "mine-let," and "royalty," will not be allowed to defeat the manifest intention of the parties as otherwise expressed in the instrument. 424.

The words "traffic agreement" a misnomer when used by traction companies as in this case. 489.

The word "railroad" should be understood, where used in the statutes of Ohio, to mean a steam road. 561.

The words "legal representatives," as used to designate the beneficiary in a certificate issued by a mutual benefit association, under Section 3630 prior to the amendment of 1891, mean the "family and heirs of the deceased member," and not his administrator. 673.

WORK HOUSE—

Power to release prisoners from, under the "Cleveland federal plan." 65.

24 64 R
5/12/01

HARVARD LAW LIBRARY

